TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 5

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE OF GEORGE WILLIAM GRAHAM, DECEASED, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 13, 1958
CERTIORARI GRANTED MARCH 2, 1959

No. 15685

United States
Court of Appeals
for the Ninth Circuit

HENRY L. HESS, Jr., Administrator of the Estate of George William Graham, deceased,
Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

HESS AND HESS,
CLAYTON HESS,
825 Yeon Building,
Portland 4, Oregon,

For Appellant.

GEORGE COCHRAN DOUB,
Assistant United States Attorney General,

PAUL A. SWEENEY,
LEAVENWORTH COLBY,
ALAN S. ROSENTHAL,
Attorneys, Department of Justice,
Washington 25, D. C.,

C. E. LUCKEY,
United States Attorney,

ROBERT R. CARNEY,
Assistant United States Attorney,
United States Courthouse,
Portland, Oregon,

KEITH R. FERGUSON,
Special Assistant to Attorney General,
447-A Post Office Building,
San Francisco, Calif.,

For Appellee.

IV.

That at all times mentioned herein the defendant was an employer and the owner of a dam across the Columbia River, near Bonneville, Oregon together with appurtenant electric power generating and transmitting facilities, locks, fishways and other equipment convenient and necessary to the operation thereof, and in connection therewith is and at all times material hereto was in charge of and responsible for work involving risk and danger to employees and the public.

V.

That at all times material hereto the maintenance and operation of said dam was and now is by law committed to and under the direction of the Secretary of the Army and the supervision of the Chief of United States Army Engineers Corps of the United States, an agency of the defendant.

VI.

That the dam is so constructed that the defendant may send water through or restrain water from going through any one or more of numerous gates across the face thereof and when water is being let through a gate or gates it rushes through with great force, violence and turbulence and creates a strong undertow in the vicinity of the gate or gates which are open, all of which makes it extremely hazardous and dangerous to be near an open gate in any type of vessel.

VII.

On or about the 23rd day of June, 1954, the United States Army Corps of Engineers let to Robert C. Larson, doing business as Larson Construction Company, a contract for repair of the apron and baffles on a portion of said dam which work was to be done during the 1954-1955 low-water period of the Columbia River; the work so contemplated made necessary the construction of a coffer dam across a portion of the down-river face of the dam in order to expose the apron and baffles to be repaired, and in turn made necessary certain initial survey work.

VIII.

That at all times material hereto plaintiff's decedent George William Graham was an employee of Robert C. Larson, doing business as Larson Construction Company, and was, among other things, employed to assist in a portion of the survey work, aforesaid, and thereafter to assist in the building of said coffer dam and said work involved risk and danger to the said George William Graham from the operations of both his employer and the defendant.

IX.

That on or about August 20, 1954, plaintiff's decedent, George William Graham, acting within the scope and course of his employment, as aforesaid, was aboard the tug "Mule Duzer" proceeding from south to north upon the waters of said river and along the face of said dam for survey purposes

when the said tug was swamped, overturned and sunk.

X.

That the swamping, overturning and sinking of said tug was proximately caused by the negligence of the defendant acting by and through its servants and agents, in that the defendant failed to use every device, care, and precaution practicable to be used for the protection and safety of life and limb, in that it would have been practicable without impairing the efficiency of the operation to use the care hereinafter set forth and take the following precautions, to-wit:

(1) To have set up a liaison system between the defendant's servants, agents and employees and the plaintiff's employer advising the plaintiff's employer upon which of the defendant's servants, agents and employees he could call to have gates closed in order to furnish a quiet pool within which to work.

(2) To have delegated authority to some one or more of its servants and agents to close any one or more gates in the vicinity of the work upon the request of plaintiff's employer in order to furnish a quiet pool within which to work.

(3) To have closed the gates in the vicinity of the work at the request of the plaintiff's employer in order to furnish a quiet pool in which to work.

(4) To have closed a sufficient number of gates in and near the vicinity of the work to furnish a quiet pool in which to work.

(5) It was necessary for the safety of persons

employed about said dam, including the plaintiff's decedent, that a system of communication be provided by means of signals between the operators of the dam and those whose work required them to be on the down-river side thereof in order that there might be prompt and efficient communication between the same, but the defendant failed and neglected to provide a prompt, efficient or any means of communication, as aforesaid.

(6) The defendant knew or by the exercise of reasonable care should have known of the dangerous undertow in the vicinity of open gates, but carelessly and negligently failed to warn the plaintiff's decedent or his employer thereof.

(7) The defendant was at all times in complete control of the operation of said dam, the force and volume of water to be let through the same and the place at which such water would be released and knew, or by the exercise of reasonable care should have known, that the tug "Mule Duzer", with the plaintiff's decedent and others aboard, would be and was operating along the face of the dam but the defendant carelessly and negligently failed to furnish plaintiff's decedent a reasonably safe place to work, in that it failed and neglected to close the gates and restrain the flow of water in the vicinity of the work being done.

(8) The defendant was at all times in complete control of the operation of said dam, the force and volume of water to be let through the same, and the place at which such water would be released and knew, or by the exercise of reasonable care should

have known, that the tug "Mule Duzer", with the plaintiff's decedent and others aboard, would be and was operating along the face of the dam but the defendant carelessly and negligently left the gates immediately adjacent to the work site open, thereby sending great volumes of water through the gates immediately adjacent to the work and thereby created highly dangerous turbulence and undertow at and near the work site. But the defendant failed and neglected to use the care or take the precautions hereinabove by sub-paragraphs (1) to (8) inclusive set forth.

XI.

That proximately as a result of the swamping and sinking of the tug "Mule Duzer" caused by the negligence and failure of the defendant to take practicable precautions, as hereinabove set forth, the plaintiff's decedent, George William Graham, was cast into the waters of the Columbia River and lost his life by drowning on August 20, 1954.

XII.

That the said George William Graham was a carpenter by trade, an industrious, frugal, healthy, able-bodied man and at the time of his death was 53 years of age, earning and capable of continuing to earn in the future sums in excess of $560.00 per month and had a life expectancy of 19.19 years.

XIII.

That the said George William Graham left surviving him a minor daughter, Karen Lee Graham, born January 16, 1938, a son, George Gordon Gra-

ham, born December 17, 1934, and his wife, Betty Graham, on whose behalf and for whose use and benefit this action is brought for the purpose of recovering damages sustained by them through the wrongful death of said decedent.

XIV.

That as a result of the death of said George William Graham funeral and burial expenses were incurred as follows:

Moore-Ditlevson Funeral home, Kelso, Washington	$682.07
Grave Marker	79.83
Burial Plot	100.00
Opening and closing grave	30.00
Minister, flowers, and miscellaneous	49.75
	$941.65

That said sums were reasonable for the services rendered and material supplied in connection with the burial of the said George William Graham.

XV.

That by reason of the death of the said George William Graham, Betty Graham, as surviving wife, has been deprived of the love, affection, care, services, support, companionship, society and consortium of the said George William Graham and because of his death has been compelled to pay and will be compelled to pay substantial sums for the care of the said Karen Lee Graham and George Gordon Graham, children of the decedent and Betty Graham; that the surviving children, aforesaid,

have been deprived of the support, love, care, guidance, moral, religious and intellectual training and instruction and of the protection of their father, all to the general damage of the plaintiff as Administrator of the Estate of George William Graham, Deceased, and for the benefit of the three survivors above named in the aggregate sum of $100,000.00.

XVI.

That the plaintiff has employed Leland F. Hess and Clayton Hess as his attorneys to bring this action and has agreed with said attorneys that they shall be compensated in the sum of twenty per cent of all such amounts as may be recovered herein and that twenty per cent of such sums as may be recovered herein would be a reasonable fee to be allowed said attorneys.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand Dollars ($100,000.00) general damages, Nine Hundred Forty-One and 65/100 ($941.65) Dollars special damages, for his costs and disbursements incurred herein, and that out of such sum as may be recovered herein plaintiff's attorneys be allowed a reasonable fee to the extent of twenty per cent (20%) of such sums.

HESS & HESS,
/s/ By CLAYTON HESS,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Robert R. Carney, Assistant United States Attorney, acting under direction of The Attorney General of the United States, and for answer to the complaint on file herein alleges:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The venue of this action does not lie in the United States District Court for the District of Oregon, but, on the contrary, venue lies, if the suit is maintainable at all, in the United States District Court for the Western District of Washington, Southern Division, for the following reasons, to wit:

1. This is a civil action on a tort claim against the United States under sub-section (b) of Section 1346 of Title 28, USCA.

2. That plaintiff brings this action as the personal representative of the decedent, George William Graham, who at the time of his death was a resident of Cowlitz County, Washington.

3. That the act or omission complained of in plaintiff's complaint occurred in Skamania County, Washington.

Third Defense

The court lacks jurisdiction of the subject matter of the cause, in that the facts alleged in the complaint constitute a discretionary function within the meaning of the exceptions set forth in 28 USCA, Section 2680(a) to the jurisdiction conferred upon the court by the Federal Tort Claims Act.

Fourth Defense

1. Defendant denies the allegations contained in Paragraph I of the complaint.

2. Defendant admits the allegations contained in Paragraphs II and III of the complaint.

3. Defendant admits that part of Paragraph IV of the complaint which alleges that at all times mentioned herein, the defendant was the owner of a dam across the Columbia River, near Bonneville, Oregon, together with appurtenant electric power generating and transmitting facilities, locks, fishways and other equipment convenient and necessary to the operation thereof, but denies all other allegations of Paragraph IV.

4. Defendant admits the allegations contained in Paragraph V of the complaint.

5. Defendant denies the allegations contained in Paragraph VI of the complaint.

6. Defendant admits the allegations contained in Paragraph VII of the complaint.

7. Defendant admits that part of Paragraph VIII of the complaint which alleges that at all

times material hereto, plaintiff's decedent, George William Graham, was an employee of Robert C. Larson, doing business as Larson Construction Company, and was, among other things, employed to assist in a portion of a survey work aforesaid, and thereafter to assist in the building of said cofferdam, but denies all other allegations of Paragraph VIII.

8. Defendant admits the allegations contained in Paragraph IX of the complaint.

9. Defendant denies the allegations contained in Paragraphs X, XI, XII, XIII, XIV, XV and XVI of the complaint and particularly denies that the plaintiff was damaged in any sum whatever.

Fifth Defense

1. On June 23, 1954 defendant entered into a certain contract numbered DA-35-026-eng-20855 with R. C. Larson, doing business as Larson Construction Company, hereinafter called the Contractor, for the construction of a cofferdam and restoration of baffles on south half of spillway baffle deck of the Bonneville Dam.

2. On August 20, 1954 plaintiff's decedent, George William Graham, was an employee of said Contractor and was aboard a certain tug "Mule Duzer", which at all times herein material was under the ownership and control of said Contractor; that on said date, said Contractor sent out said tug, pushing a barge designated "Osborne No. 12", on the waters of the Columbia River immediately

downstream of the Bonneville Dam, in order to perform certain survey work preliminary to the construction of the cofferdam.

3. That said Contractor, through its agents and employees, so carelessly and negligently operated its said tug and barge at said time and place, that the bow of said barge struck a pier of the dam with great force and violence, opening a large hole on the port side of the bow of said barge, which hole allowed large quantities of water to enter said barge and causing said tugboat and said barge to then and there become out of control and to drift northward over and in front of the gates of the dam, which were then open, causing said tug and barge to be swamped, overturned and sunk and causing the plaintiff's deceased to then and there lose his life.

4. That said Contractor, its agents and employees, were at all times herein mentioned careless, reckless and negligent in each of the following particulars, to wit:

a. In operating and maneuvering said tug and barge over and against the pier of said dam when the Contractor, its agents and employees knew, or in the exercise of ordinary care should have known, that operating said tug and barge against said pier in such manner created a grave and imminent hazard to persons in said tug and particularly the plaintiff's decedent herein.

b. In failing to keep a proper or any lookout

from said tug for objects in the path of said tug and barge.

c. In failing to keep said tugboat and barge under proper or any control at said time and place and in particular in failing to keep said barge from striking a pier of the dam.

d. In failing to have a standby boat and other standby equipment ready for use in the event of an emergency.

e. In failing to utilize lines suitably established between said tug, barge and dam so that the barge and tug could be hauled back in the event of danger.

f. In employing a tugboat of insufficient size and power to carry out the work then and there contemplated.

5. That said tugboat was unseaworthy and that it was of insufficient size and power to carry out the work then and there contemplated.

6. The sole and proximate cause of said collision and sinking of said tugboat and barge and all of the damages resulting therefrom and therein, including the death of plaintiff's decedent, George William Graham, was the negligence of said Contractor in the operation of said tugboat and barge in which plaintiff was a passenger and the unseaworthiness of said tugboat.

Sixth Defense

Defendant readopts and reasserts the allegations of defense hereinabove set forth in Paragraphs 1

and 2 of the Fifth Defense, and for further answer shows:

1. That the construction and work called for by the said contract were in charge of and under the control of R. C. Larson, doing business as Larson Construction Company, hereinafter called the Contractor.

2. That the defendant had no control of the details, manner, means or method by which the construction and work provided for by said contract were to be accomplished and was concerned only with the general result of the construction and work called for by the said contract.

3. That defendant retained only the right to inspect the construction and work of the Contractor as it progressed, in order to determine whether it was being completed in accordance with the specifications set forth in said contract.

4. Defendant had no duty under said contract to assist in the construction and work being accomplished by said Contractor, and no employees of defendant engaged or participated with said Contractor in the accomplishment of the construction and work required by said contract.

5. That plaintiff is an employee of said Contractor and was at the time of his death engaged in the prosecution of the work of said Contractor and was not engaged in any work of defendant; that defendant owed plaintiff no duty under the Oregon Employers' Liability Act.

Seventh Defense

Plaintiff's employment had certain risks incident thereto, which were obvious and well-known to plaintiff at all the times of his employment, and also when he first entered thereon, and those risks were assumed by him, and whatever injuries plaintiff received in his employment and which are complained of by him herein, arose from and were caused by those risks thus assumed by him.

Wherefore, defendant having fully answered plaintiff's complaint herein, prays that plaintiff take nothing by his action and that the complaint be dismissed and held for naught, and that defendant be given judgment for its costs and disbursements incurred herein.

C. E. LUCKEY,
United States Attorney,
District of Oregon,

/s/ ROBERT R. CARNEY,
Assistant United States
Attorney.

Affidavit of Mailing Attached.

[Endorsed]: Filed Sept. 7, 1955.

In the United States District Court
for the District of Oregon

Civil No. 8076

JAMES L. WINTON, as Administrator of the Estate of Leonard L. Boylan, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil No. 8041

HENRY L. HESS, JR., as Administrator of the Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil No. 8256

JESSIE G. TOBIAS, as Administratrix of the Estate of Merle L. Tobias, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

STIPULATION

It Is Stipulated by the parties hereto, by and through their respective undersigned attorneys of record, that the above-entitled actions may be con-

solidated for the purposes of motions, pretrial procedure and trial, and for all other purposes.

/s/ GEOFFREY C. HAZARD, JR.,
Of Attorneys for James L. Winton.
/s/ CLAYTON HESS,
Of Attorneys for Henry L. Hess, Jr.
/s/ R. L. KRIESIER,
Of Attorneys for Jessie G. Tobias.
/s/ ROBERT R. CARNEY,
Of Attorneys for Defendant.

[Endorsed]: Filed Feb. 28, 1956.

[Title of District Court and Causes.]

PRETRIAL ORDER ON SEGREGATED ISSUES OF LAW

The above-entitled causes came on for pretrial conference before the undersigned Judge of the above-entitled Court, plaintiff Henry L. Hess, Jr., appearing by Clayton Hess, of his attorneys; plaintiff James L. Winton, appearing by Geoffrey C. Hazard, Jr., of his attorneys; plaintiff Jessie G. Tobias appearing by Ray Mize, of her attorneys; and defendant United States of America appearing by Robert R. Carney, Assistant United States Attorney, of its attorneys.

Introductory Statement

These are actions against the United States of America for damages for the death of three persons resulting from the sinking of a tugboat and barge

on the Columbia River, in which jurisdiction is claimed by plaintiffs under the Federal Tort Claims Act.

This pretrial is upon the following segregated issues of law:

(a) Whether notice to the Deputy Commissioner of the Bureau of Employees' Compensation, Longshoremen's and Harbor Workers' Compensation Act, is a mandatory prerequisite to the bringing of this action against the defendant, who is one other than the employer of the plaintiffs' decedents.

(b) May plaintiffs' decedents maintain actions predicated on the Oregon Employers' Liability Act where the deaths of plaintiffs' decedents occurred on navigable waters, plaintiffs contending that said deaths were proximately caused by the negligent operation of a shore installation.

The issues of negligence, proximate cause and all other issues of fact and law are reserved for the pretrial and trial pending the determination of the above segregated issues of law.

Statement of Agreed Facts

I.

In Civil No. 8041, Henry L. Hess, Jr., is the duly appointed, qualified and acting administrator of the Estate of George William Graham, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 4, 1955. In Civil No. 8076, James L. Winton is the duly appointed, qualified and acting administrator of the

Estate of Leonard L. Boylan, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 26, 1955. George William Graham and Leonard L. Boylan were at the time of their death residents of the State of Washington and no persons entitled to bring this action as named beneficiaries under O.R.S. 654.325 as to such decedents are residents of the State of Oregon. Such personal representatives are the proper persons to bring these actions for the purposes of O.R.S. 654.325 and O.R.S. 30.020.

In Civil No. 8256, Jessie G. Tobias is the duly appointed, qualified and acting administratrix of the estate of Merle L. Tobias, having been duly appointed such administratrix by order of the Circuit Court of the State of Oregon for the County of Multnomah; and is the proper person to bring this action for the purpose of O.R.S. 30.020.

II.

These actions have been consolidated for the purposes of motions, pretrial procedure, trial and all other purposes.

III.

At all times herein material, George William Graham, Leonard L. Boylan and Merle L. Tobias were employees of Robert C. Larson, doing business as Larson Construction Company, hereinafter referred to as the Contractor, and all acts done by them therein related were done in the course of their employment by said contractor. Graham was

employed as a carpenter foreman, Boylan as a carpenter and Tobias as a civil engineer.

IV.

At all times herein material, Bonneville Dam was under the ownership and control of defendant, United States of America. Bonneville Dam consists of various facilities, principal among which are a powerhouse, which lies between the Oregon shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays and in each bay there is a movable gate. These bays are for convenience herein numbered 1 through 18, starting with the fishway bay on the Washington shore as Bay 1 and ending with the fishway bay on Bradford Island as Bay 18. The gates on the spillway dam are opened and closed by being lifted or dropped in a vertical direction. When shut, the gates rest on the top of the ogee section, which is the upper line of the submerged stationary portion of the dam.

On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which are built into the deck. The baffles serve to dissipate the energy of the water discharged through the dam and to reduce the downstream velocity thereof. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and

baffles had been eroded by the flow of water. The physical features of the dam are more clearly depicted in Exhibits 1 and 2 of this pretrial order.

V.

On June 23, 1954, the Contractor and defendant entered into a certain contract numbered DA-35-026-eng-20855 (Exhibit 3), for construction of a cofferdam and restoration of baffles on south half of the spillway baffle deck. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by the Contractor without interruption of the normal power generation of the powerhouse. It further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The Contractor's employees, including Graham, Boylan and Tobias, entered upon defendant's premises at and about project site while the spillway dam was in operation. The contract further contemplated that Contractor would inform defendant of all steps which he proposed to take which would affect the operation of the spillway dam. By the terms of the contract, Contractor was to supply all equipment, including the tug and barge involved in these actions, and all labor used in the performance of the contract. The contract further contemplated that operation of the dam, including operation of spillway dam

gates, would be conducted by personnel of defendant.

VI.

On July 14, 1954, defendant gave the Contractor notice to proceed with the performance of the contract. Thereafter the Contractor commenced preliminary marshalling of equipment and contruction materials on and in the vicinity of the project site. On August 13, 1954, defendant notified the Contractor that the water level of the river was such that, in accordance with Paragraph SC-1 of the contract, the contractor was to commence construction work on the water no later than August 23, 1954. Prior to August 16, 1954, the Contractor had erected his field office and certain other work facilities on the defendant's premises.

VII.

On August 13, 1954, Robert C. Larson conferred with Albert M. Capps, an employee of defendant and Project Superintendent in charge of the operation of Bonneville Dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time, it was found possible to close Gates 11 through 17, that is, all the gates on the south half of the spillway dam from Gate 11 southward toward the Bradford Island side, except for the fishway gate, not material herein. As shown by Exhibit 4, Gates 11 through 17 were closed on August 13, 1954 and remained closed thereafter and during all times material herein.

VIII.

On August 16, 1954, Patrick S. Leonti, an employee of the defendant and Construction Project Engineer under said contract, arrived at Bonneville. Leonti's duties, among others, were to inspect the project during the construction by the Contractor, in order to ascertain that the Contractor was performing the contract in accordance with its terms. He also acted as liaison between the Contractor and those employees of the defendant concerned with operation of the dam. Leonti, between August 16, 1954 and August 20, 1954, familiarized himself with the project and conferred with Robert Larson and Harry Claterbos, Jr., Acting Superintendent for the Contractor, as to the Contractor's plans for carrying out the project. Leonti informed the Contractor that any requests by the Contractor for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of defendant charged with operating the dam and its gates.

IX.

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. The timber crib was to rest in Bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope, the ogee, and was to be built to fit that curve as nearly as reasonably possible. The position and shape in which the crib was to be placed are indicated on Exhibits 5 and 6.

X.

The contract drawings showed the cross-section of the ogee as it had been originally constructed. See Exhibit 7. The Contractor concluded that the ogee might have been eroded to some degree and that the cross-section of the ogee accordingly might not still be the same as when originally constructed. The Contractor determined that it was necessary to take soundings of the ogee in Bay 9 for the purpose of establishing its true cross-section at that time. The contract did not require nor did it refer to the taking of soundings in the project area.

XI.

On August 18, 1954, the Contractor informed Leonti that it proposed to take soundings in Bay 9 on August 20, 1954. Leonti was informed that the Contractor intended to take a tug and barge out on the water below the dam to push the barge into Bay 9, and to take the soundings off the side of the barge. The Contractor requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P.M. of August 20, 1954, to facilitate the sounding operation. The Contractor did not request any other gates to be closed than 9 and 10. Leonti forwarded this request to the operations division of the dam and by 12:30 P.M. of August 20th, the gates in these bays had been closed. With the closure of Gates 9 and 10, gates 9 through 17 were closed. The Contractor sought no advice from the defendant and defendant gave the Contractor no advice as to the hazards of the Contractor's proposed sounding operation.

XII.

Shortly before 2:00 P.M. on August 20, 1954, Contractor's Tug Muleduzer, pushing the Contractor's Barge Forest No. 12, set out from the Bradford Island shore of the river. The equipment and personnel utilized in the proposed sounding operation were selected solely by the Contractor. The tug's crew consisted of Magnor Larsen, Captain, and Henry Coles, deckhand, both of whom were employees of the Contractor. Also aboard were the members of the sounding party consisting of Graham, Boylan and Tobias and a man named Lewis. Graham and Boylan were in non-supervisory capacities and had no control with respect to the manner in which the sounding operation was to be conducted.

The tug was pushing the barge, which was made fast to the tug by four lines. Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug and the other two lines ran from the stern mooring bits of the barge to the stern winches of the tug. So fastened together, the tug and barge were in effect a unit.

XIII.

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed upstream for Bay 9. As the barge came to Bay 9, it veered north and the port bow of the barge struck the pier between Bay 9 and Bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved

over in front of Bay 8 and the other open bays north of Bay 8. The barge and tug were swamped and sunk with the barge being broken to pieces. All those aboard the tug and barge were thrown into the water and all except Coles, the deckhand, were killed.

XIV.

As shown by Exhibit 4, Gate 8 was open two "dogs" so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; gate 7 was open three "dogs" so that the height of the aperture was 55 inches; gate 6 was open two "dogs," so that aperture was 32 inches high. These gates were all fifty feet wide and fifty feet high. The quantity of water being discharged from these gates was approximately as follows: 5,700 cubic feet per second from gates 8 and 6, and 9,100 cubic feet per second from gate 7.

XV.

The Contractor at the time of the death of Graham, Boylan and Tobias was insured by a qualified carrier against liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Neither the insurer nor the Contractor had given notice to the Deputy Commissioner that such insurance was in force and the Contractor had not otherwise secured the payment of such compensation as provided in 33 U.S.C. Section 932. The statutory beneficiaries of plaintiffs' decedents, pursuant to their application, were awarded and are presently receiving compensation under the Oregon Workman's Compensation Act.

XVI.

The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act of plaintiffs' decedents did not file any application for compensation under that Act, nor have they been awarded nor have they received any compensation under that Act.

XVII.

The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act have not filed with or given notice to the Deputy Commissioner of the Bureau of Employees' Compensation of an election to bring an action for damages against some persons other than the employer of plaintiffs' decedents as provided in 33 U.S.C. Section 933(a).

XVIII.

The deaths of plaintiffs' decedents occurred upon the navigable waters of the United States.

Plaintiffs' Contentions of Law

I.

The Oregon Workman's Compensation Act validly provides compensation for the beneficiaries of the plaintiffs' decedents, so that the Longshoremen's and Harbor Workers' Compensation Act is inapplicable.

II.

Even if the Longshoremen's and Harbor Workers' Compensation Act is exclusively applicable, the beneficiaries failure to give notice to the Deputy Commissioner, Bureau of Employees' Compensation, is not fatal to the bringing of this action.

III.

Plaintiffs are not precluded from relying on the Oregon Employers' Liability Act by reason of the fact that the deaths of plaintiffs' decedents occurred on navigable waters.

Defendant denies foregoing contentions of law.

Defendant's Contentions of Law

I.

The deaths of plaintiffs' decedents were deaths for which compensation is or was payable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq.

II.

Plaintiffs are precluded from any recovery against defendant by the failure of beneficiaries of plaintiffs' decedents under Longshoremen's and Harbor Workers' Compensation Act to give notice of election to sue a party other than the decedents' employer to the Deputy Commissioner, Bureau of Employees' Compensation, pursuant to 33 U.S.C. Section 933.

III.

An action for damages for death of a workman on the navigable waters within the territorial limits of Oregon is governed by the general maritime law.

IV.

There being no right of action for death under the general maritime law, the death statute of the State of Oregon is applicable to action for damages

for death of a workman occurring on navigable waters within the territorial limits of Oregon.

V.

Under the general maritime law, the Oregon Employers' Liability Act cannot be applied to actions for damages for death of a workman occurring on navigable waters within the territorial limits of Oregon.

Plaintiffs deny foregoing contentions of law.

Issues of Law

I.

Whether compensation for the death of plaintiffs' decedents is payable under the Longshoremen's and Harbor Workers' Compensation Act to the exclusion of the Oregon Workman's Compensation Act within the meaning of 33 U.S.C. Section 903.

II.

Assuming compensation for the deaths of plaintiffs' decedents is payable under the Longshoremen's and Harbor Workers' Compensation Act, were the beneficiaries of plaintiffs' decedents under that Act, as a prerequisite to the bringing of these actions, required to give notice of election to sue a party other than decedents' employer to the Deputy Commissioner, Bureau of Employees' Compensation, pursuant to 33 U.S.C. Section 933.

III.

Whether plaintiffs' remedy is under the Oregon

Wrongful Death Act or the Oregon Employers' Liability Act, in the event the latter is otherwise applicable to defendant.

Exhibits

The following exhibits have been displayed by the parties respectively and are below enumerated. Production of the originals is waived and, unless objection is noted, no further identification will be required at trial, nor will authentication of signatures or proof of identity of parties signing documents be demanded. Objections as to competency, relevancy and materiality are also waived unless especially noted.

Plaintiffs' Exhibits:

1. Site Map of Bonneville Dam, No. M-2-61/1.

2. Drawing of timber crib and ogee, No. M-2-61/5.

3. Contract No. DA-35-026-eng-20855.

4. Spillway Dam Record, August 13 & 20, 1954.

5. Photograph of timber crib No. 18000-1173.

6. Photograph of baffle deck No. 18000-1227.

7. Drawing of apron and baffle deck, No. M-2-61/3.

The parties hereto agree to the foregoing Pretrial Order with respect to the segregated issues of law set forth herein, and the Court being fully advised in the premises,

Now Orders that the foregoing Pretrial Order

shall not be amended, except by consent of the parties or to prevent manifest injustice, and it is further,

Ordered that this Pretrial Order supersedes all pleadings with respect to the issues here presented, and it is further,

Ordered that the rights of the parties to pretrial and trial on the remaining issues of fact and law are reserved.

Dated at Portland, Oregon, this 3rd day of December, 1956.

/s/ GUS J. SOLOMON,
Judge.

/s/ CLAYTON HESS,
Of attorneys for plaintiff,
Henry L. Hess, Jr.

/s/ GEOFFREY C. HAZARD, Jr.
Of attorneys for plaintiff,
James L. Winton.

/s/ RAY MIZE,
Of attorneys for plaintiff,
Jessie G. Tobias.

/s/ ROBERT R. CARNEY,
Assistant United States Attorney,
Of attorneys for defendant.

[Endorsed]: Filed Dec. 3, 1956.

[Title of District Court and Causes.]

STIPULATION

It Is Hereby Stipulated by and between the respective parties hereto:

I.

Henry L. Hess, Jr., James L. Winton and Jessie G. Tobias are all residents of Oregon.

In Civil 8041, Henry L. Hess, Jr., is the duly appointed, qualified and acting administrator of the Estate of George William Graham, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 4, 1955. In Civil 8076, James L. Winton is the duly appointed, qualified and acting administrator of the Estate of Leonard L. Boylan, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 26, 1955. George William Graham and Leonard L. Boylan were at the time of their deaths residents of the State of Washington and no persons entitled to bring this action as named beneficiaries under ORS 654.325 as to such decedents are residents of the State of Oregon. Such personal representatives are the proper persons to bring these actions for the purposes of ORS 654.325 and ORS 30.020.

In Civil 8256, Jessie G. Tobias is the duly appointed, qualified and acting administratrix of the estate of Merle L. Tobias, having been duly appointed such administratrix by order of the Cir-

cuit Court of the State of Oregon for the County of Multnomah, and is the proper person to bring this action for the purpose of ORS 30.020.

For the purposes of this action for the death of Merle L. Tobias, Jessie G. Tobias shall also be deemed to have brought this action individually as the widow and surviving spouse of Merle L. Tobias and as guardian of the persons and property of Mary Tobias and Robert Tobias, the surviving minor children of Merle L. Tobias.

II.

These actions have been consolidated for the purposes of motions, pretrial procedure, trial and all other purposes.

III.

At all times herein material, George William Graham, Leonard L. Boylan and Merle L. Tobias were employees of Robert C. Larson, doing business as Larson Contruction Company, hereinafter referred to as the Contractor, and all acts done by them herein related were done in the course of their employment by said Contractor. Graham was employed as a carpenter foreman, Boylan as a carpenter and Tobias as a civil engineer.

IV.

At all times herein material, Bonneville Dam was under the ownership and control of defendant, United States of America. Bonneville Dam consists of various facilities, principal among which are a powerhouse, which lies between the Oregon

shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays and in each bay there is a movable gate. These bays are for convenience herein numbered 1 through 18, starting with the fishway bay on the Washington shore as Bay 1 and ending with the fishway bay on Bradford Island as Bay 18. The gates on the spillway dam are opened and closed by being lifted or lowered in a vertical direction. When shut, the gates rest on the top of the ogee section, which is the upperline of the submerged stationary portion of the dam.

On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which are built into the deck. The baffles serve to dissipate the energy of the water discharged through the dam and to reduce the downstream velocity thereof. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and baffles had been eroded to some unascertained degree by the flow of water. The physical features of the dam are more clearly depicted in Exhibits 1 and 2.

V.

On June 23, 1954, the Contractor and defendant entered into a certain contract numbered DA-35-026-eng-20855 (Exhibit 3), for construction of a cofferdam and restoration of baffles on south half of the

spillway baffle deck. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by the Contractor without interruption of the normal power generation of the powerhouse. It further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The Contractor's employees, including Graham, Boylan and Tobias, entered upon defendant's premises at and about project site while the spillway dam was in operation. The contract further contemplated that Contractor would inform defendant of all steps which he proposed to take which would affect the operation of the spillway dam. By the terms of the contract, Contractor was to supply all equipment, including the tug and barge involved in these actions, and all labor used in the performance of the contract. The contract further contemplated that operation of the dam, including operation of spillway dam gates, would be conducted by personnel of defendant.

VI.

On July 14, 1954, defendant gave the Contractor notice to proceed with the performance of the contract. Thereafter the Contractor commenced preliminary marshalling of equipment and construction materials on and in the vicinity of the project site. On August 13, 1954, defendant notified the

Contractor that the water level of the river was such that, in accordance with Paragraph SC-1 of the contract, the contractor was to commence construction work on the water no later than August 23, 1954. Prior to August 16, 1954, the Contractor had erected his field office and certain other work facilities on the defendant's premises.

VII.

On August 13, 1954, Robert C. Larson conferred with Albert M. Capps, an employee of defendant and Project Superintendent in charge of the operation of Bonneville Dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time, it was found possible to close Gates 11 through 17, that is, all the gates on the south half of the spillway dam from Gate 11 southward toward the Bradford Island side, except for the fishway gate, not material herein. As shown by Exhibit 4, Gates 11 through 17 were closed on August 13, 1954, and remained closed thereafter and during all times material herein.

VIII.

On August 16, 1954, Patrick S. Leonti, an employee of the defendant and Construction Project Engineer under said contract, arrived at Bonneville. Leonti's duties, among others, were to inspect the project during the construction by the Contractor, in order to ascertain that the Contractor was performing the contract in accordance with its

terms. He also acted as liaison between the Contractor and those employees of the defendant concerned with operation of the dam. Leonti, between August 16, 1954 and August 20, 1954, familiarized himself with the project and conferred with Robert Larson and Harry Claterbos, Jr., Acting Superintendent for the Contractor, as to the Contractor's plans for carrying out the project. Leonti informed the Contractor that any requests by the Contractor for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of defendant charged with operating the dam and its gates.

IX.

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. The timber crib was to rest in Bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope, the ogee, and was to be built to fit that curve as nearly as reasonably possible. The position and shape in which the crib was to be placed are indicated on Exhibits 5 and 6.

X.

The contract drawings showed the cross-section of the ogee as it had been originally constructed. See Exhibit 7. The Contractor concluded that the ogee might have been eroded to some degree and that the cross-section of the ogee accordingly might not still be the same as when originally constructed.

The Contractor determined that it was necessary to take soundings of the ogee in Bay 9 for the purpose of establishing its true cross-section at that time. The contract specifications did not require nor did it refer to the taking of soundings in the project area.

XI.

On August 18, 1954, the Contractor's representative informed Leonti that they proposed to take soundings in Bay 9 on August 20, 1954. Leonti was informed that the Contractor intended to take a tug and barge out on the water below the dam to push the barge into Bay 9, and to take soundings off the side of the barge. The Contractor requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P.M. of August 20, 1954, to facilitate the sounding operation. The Contractor did not request any other gates to be closed than 9 and 10. Leonti forwarded this request to the operations division of the dam and by 12:30 P.M. of August 20, the gates in these bays had been closed. With the closure of Gates 9 and 10, Gates 9 through 17 were closed. The contractor sought no advice from the defendant and defendant gave the Contractor no advice as to the hazards of the Contractor's proposed sounding operation.

XII.

Shortly before 2:00 P.M. on August 20, 1954, Contractor's Tug Muleduzer, pushing the Contractor's Barge Forest No. 12, set out from the Bradford Island shore of the river. The equipment and

personnel utilized in the proposed sounding operation were selected solely by the Contractor. The tug's crew consisted of Magnor Larson, Captain, and Henry Coles, deckhand, both of whom were employees of the Contractor. Also aboard were the members of the sounding party, consisting of Graham, Boylan and Tobias and a man named Lewis. Graham, Boylan and Lewis were in non-supervisory capacities and had no control with respect to the manner in which the sounding operation was to be conducted. Tobias was Civil Engineer in charge of this sounding operation for his employer, the Contractor.

The tug was pushing the barge, which was made fast to the tug by four steel lines. Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug and the other two lines ran from the stern mooring bits of the barge to the stern winches of the tug. So fastened together, the tug and barge were in effect a unit.

XIII.

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed upstream for Bay 9. As the barge came to Bay 9, it veered north and the port bow of the barge struck the pier between Bay 9 and Bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved over in front of Bay 8 and the other open bays north of Bay 8. The barge and tug were swamped and sunk with the barge being broken to pieces. All those aboard the tug and barge were

thrown into the water and all except Coles, the deckhand, were drowned.

XIV.

As shown by Exhibit 4, at the time of the accident, Gate 8 was open two "dogs" so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; Gate 7 was open three "dogs" so that the height of the aperture was 55 inches; Gate 6 was open two "dogs," so that the aperture was 32 inches high. These gates were all fifty feet wide and fifty feet high. The quantity of water being discharged from these gates at that time was approximately as follows: 5,700 cubic feet per second from Gates 8 and 6, and 9,100 cubic feet per second from Gate 7. At this time, the elevation of the forebay in the spillway dam was about 73.5 feet and the elevation of the tailrace below spillway dam was about 18.6 feet. The elevation of the crest of the ogee at the spillway dam was about 24 feet, as measured from a fixed reference point at the dam. All elevations are measured from a fixed reference point at the dam.

XV.

The deaths of plaintiffs' decedents occurred upon the navigable waters of the United States.

XVI.

The ages and life expectancies according to the 1941 Commissioners Standard Ordinary Mortality Table, of plaintiffs' decedents at the time of their deaths were as follows:

Name	Age	Life Expectancy
Graham	53	19.19
Boylan	54	18.48
Tobias	48	22.88

XVII.

The relatives of plaintiffs' decedents, their ages, and their degree of dependency on their decedents at the time of the death of the decedents were as follows:

GEORGE WILLIAM GRAHAM

Name	Relationship	Age	Degree of Dependency
Betty Graham	Wife	44	Subject to proof
Karen Lee Graham	Daughter	16	Subject to proof
George Gordon Graham	Son	19	Subject to proof

LEONARD L. BOYLAN

Name	Relationship	Age	Degree of Dependency
Lydia Lenora Boylan	Wife	49	Subject to proof
Naomi Lenora Simpson	Daughter	Legal	None
Betty Jane Stewart	Daughter	Legal	None
Vernon Leroy Boylan	Son	Legal	None
Jennita Massey	Daughter	19	None
William Albert Boylan	Son	15	Subject to proof
Florence Marie Boylan	Daughter	13	Subject to proof

MERLE L. TOBIAS

Name	Relationship	Age	Degree of Dependency
Jessie G. Tobias	Wife	45	Subject to proof
Mary Tobias	Daughter	14	Subject to proof
Robert Tobias	Son	18	Subject to proof

XVIII.

The reasonable funeral expenses incurred with respect to plaintiffs' decedents were as follows:

Name	Funeral Expenses
George William Graham	$ 941.65
Leonard L. Boylan	742.17
Merle L. Tobias	1,049.50

XIX.

Immediately after the sinking of the tug and barge, a distress whistle was sounded at the spillway dam. Defendant immediately commenced closing the gates of the spillway dam, completing closure of all the gates at 3:45 P.M. on August 20, 1954. Immediately thereafter, defendant reopened some of the gates. The sequence and time in which these gates were closed and reopened are shown in Exhibit 4.

XX.

Defendant was not an employer subject to the provisions of the Oregon State Workmen's Compensation Act.

XXI.

Should plaintiffs prevail in this action, twenty per cent of the sums respectively awarded is a reasonable sum to be allowed their respective counsel, out of, but not in addition to, the amounts of the respective awards to plaintiffs.

XXII.

The tug Muleduzer is 50 feet long, has a 15-foot beam, draws 5½ feet aft and 2½ feet forward. It has two No. 671 GMC 165 horsepower diesel engines which drive two 4-bladed bronze propellers through 3 to 1 reduction gears.

XXIII.

Exhibits

The following exhibits have been displayed by the parties respectively and are below enumerated. Production of the originals is waived and, unless objection is noted, no further identification will be required at trial, nor will authentication of signatures or proof of identity of parties signing documents be demanded. Objections as to competency, relevancy and materiality are reserved.

Exhibit Nos: Description.

1. Site Map of Bonneville Dam, No. M-2-61/1.
2. Drawing of timber crib and ogee, No. M-2-61/3.
3. Contract No. DA-35-026-eng-20855.
4. Spillway Dam Record, August 13 & 20, 1954.
5. Photograph of timber crib No. 18000-1173.
6. Photograph of baffle deck No. 18000-1227.
7. Drawing of apron and baffle deck, No. M-2-61/5.
8. Depositions of: Patrick J. Leonti, Grover G. Goebel, Albert M. Capps.
9. Deposition of Robert C. Larson.
10. Survey of Barge.
11. Photograph of Floating Plant with template, No. 18000-1153.
12. Photograph of Cofferdam No. 18000-1205.
13. Photograph of Cofferdam from Washington Shore, No. 18000-1207.
14. Photograph of Cofferdam and baffle deck, No. 18000-1228.

15. Photograph of face of spillway dam, No. B-305.

16. Photograph of Stilling basin looking North, No. B-308.

17. Hydrology Data, August 1954.

18. Letter from Larson to District Engineer dated July 2, 1954.

19. Letter from Larson to Corps of Engineers dated August 2, 1954.

20. Statement of Henry A. Coles.

21. Photograph of Warning sign on Bradford Island.

22. Photograph of Warning sign on Washington Shore.

23. Federal Income Tax Returns of Merle L. Tobias, 1951, 1952, 1953, and 1954.

24. Federal Income Tax Returns of George W. Graham.

25. Federal Income Tax Returns of Leonard L. Boylan.

Dated at Portland, Oregon, this 3rd day of December, 1956.

/s/ GEOFFREY C. HAZARD, JR.,
Of Attorneys for James L. Winton.

/s/ CLAYTON HESS,
Of Attorneys for Henry L. Hess, Jr.

/s/ HERMAN P. HENDERSHOTT,
Of Attorneys for Jessie G. Tobias.

/s/ ROBERT R. CARNEY,
Of Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1956.

[Title of District Court and Causes.]

OPINION

March 29, 1957.

Solomon, Judge:

Each of the above actions against the United States was brought under the Federal Tort Claims Act for damages for wrongful death resulting from the sinking of a tugboat and barge on the Columbia River.

The United States contends that it cannot be sued by these plaintiffs because the deaths fell under the exclusive jurisdiction of the Federal Longshoreman's and Harbor Workers' Compensation Act and the plaintiffs did not comply with the provisions of that Act relating to notice to the Bureau of Employees' Compensation of their intention to sue a third party. Without reaching the question whether these notice provisions are a condition precedent to suit, I find this contention is without merit because the cases do not fall under the jurisdiction of the Federal Longshoreman's Act.

Plaintiffs contend that the standard of care and the measure of damages is to be determined by the Oregon Employers' Liability Act. In my view, this Act is not applicable for the reason that the Government was not responsible for the work there being performed, and for the further reason that the high standard of care required under the Act, if applied to these cases, would be unconstitutional. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1916);

Sanderson v. Sause Bros. Ocean Towing Co. D. C. Or. 1953, 114 F.Supp. 849.

I further find that plaintiffs have failed to prove that defendant was guilty of negligence in any respect, and they are therefore not entitled to recover under the Oregon Wrongful Death Statute, ORS 30.020, the only act under which they could recover.

Defendant shall submit findings of fact, conclusions of law and a judgment in accordance with this memorandum opinion.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Causes.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiffs Henry L. Hess, Jr., James L. Winton and Jessie G. Tobias are all residents of Oregon.

In Civil 8041, Henry L. Hess, Jr., is the duly appointed, qualified and acting administrator of the Estate of George William Graham, Deceased, having been duly appointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 4, 1955. In Civil 8076, James L. Winton is the duly appointed, qualified and acting administrator of the Estate of Leonard L. Boylan, Deceased, having been duly ap-

pointed such administrator by order of the Circuit Court of the State of Oregon for Multnomah County dated April 26, 1955. George William Graham and Leonard L. Boylan were at the time of their deaths residents of the State of Washington and no persons entitled to bring this action as named beneficiaries under ORS 654.325 as to such decedents are residents of the State of Oregon. Such personal representatives are the proper persons to bring these actions for the purposes of ORS 654.325 and ORS 30.020.

In Civil 8256, Jessie G. Tobias is the duly appointed, qualified and acting administratrix of the estate of Merle L. Tobias, having been duly appointed such administratrix by order of the Circuit Court of the State of Oregon for the County of Multnomah, and is the proper person to bring this action for the purpose of ORS 30.020.

For the purposes of this action for the death of Merle L. Tobias, Jessie G. Tabias is deemed to have brought this action individually as the widow and surviving spouse of Merle L. Tobias and as guardian of the persons and property of Mary Tobias and Robert Tobias, the surviving minor children of Merle L. Tobias.

2. These actions were consolidated for trial.

3. At all times herein material, George William Graham, Leonard L. Boylan and Merle L. Tobias were employees of Robert C. Larson, doing business as Larson Construction Company, hereinafter re-

ferred to as the Contractor, and all acts done by them herein related were done in the course of their employment by said Contractor. Graham was employed as a carpenter foreman, Boylan as a carpenter and Tobias as a civil engineer.

4. At all times herein material, Bonneville Dam was under the ownership and control of defendant, United States of America. Bonneville Dam consists of various facilities, principal among which are a powerhouse, which lies between the Oregon shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays and in each bay there is a moveable gate. These bays are for convenience herein numbered 1 through 18, starting with the fishway bay on the Washington shore as Bay 1 and ending with the fishway bay on Bradford Island as Bay 18. The gates on the spillway dam are opened and closed by being lifted or lowered in a vertical direction. When shut, the gates rest on the top of the ogee section, which is the upperline of the submerged stationary portion of the dam.

On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which are built into the deck. The baffles serve to dissipate the energy of the water discharged through the dam and to re-

duce the downstream velocity thereof. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and baffles had been eroded to some unascertained degree by the flow of water.

5. On June 23, 1954, the Contractor and defendant entered into a certain contract numbered DA-35-026-eng-20855, for construction of a cofferdam and restoration of baffles on south half of the spillway baffle deck. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by the Contractor without interruption of the normal power generation of the powerhouse. It further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The Contractor's employees, including Graham, Boylan and Tobias, entered upon defendant's premises at and about project site while the spillway dam was in operation. The contract further contemplated that Contractor would inform defendant of all steps he proposed to take which would affect the operation of the spillway dam. By the terms of the contract, Contractor was to supply all equipment, including the tug and barge involved in these actions, and all labor used in the performance of the contract. The contract further con-

templated that operation of the dam, including operation of spillway dam gates, would be conducted by personnel of defendant.

6. On July 14, 1954, defendant gave the Contractor notice to proceed with the performance of the contract. Thereafter the Contractor commenced preliminary marshalling of equipment and construction materials on and in the vicinity of the project site. On August 13, 1954, defendant notified the Contractor that the water level of the river was such that, in accordance with Paragraph SC-1 of the contract, the Contractor was to commence construction work on the water no later than August 23, 1954. Prior to August 16, 1954, the Contractor had erected his field office and certain other work facilities on the defendant's premises.

7. On August 13, 1954, the Contractor personally conferred with Albert M. Capps, an employee of defendant and Project Superintendent in charge of the operation of Bonneville Dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time, it was found possible to close Gates 11 through 17, that is, all the gates on the south half of the spillway dam from Gate 11 southward toward the Bradford Island side, except for the fishway gate, not material herein. Gates 11 through 17 were closed on August 13, 1954, and remained closed thereafter and during all times material herein.

8. On August 16, 1954, Patrick S. Leonti, an employee of the defendant and Construction Project Engineer under said contract, arrived at Bonneville. Leonti's duties, among others, were to inspect the project during the construction by the Contractor, in order to ascertain that the contractor was performing the contract in accordance with its terms. He also acted as liaison between the Contractor and those employees of the defendant concerned with operation of the dam. Leonti, between August 16, 1954, and August 20, 1954, familiarized himself with the project and conferred with Robert Larson and Harry Claterbos, Jr., Acting Superintendent for the Contractor, as to the Contractor's plans for carrying out the project. Leonti informed the Contractor that any requests by the Contractor for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of defendant charged with operating the dam and its gates.

9. According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. The timber crib was to rest in Bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope, the ogee, and was to be built to fit that curve as nearly as reasonably possible.

10. The contract drawings showed the cross-section of the ogee as it had been originally con-

structed. The Contractor concluded that the ogee might have been eroded to some degree and that the cross-section of the ogee accordingly might not still be the same as when originally constructed.

The Contractor determined that it was necessary to take soundings of the ogee in Bay 9 for the purpose of establishing its true cross-section at that time. The contract specifications did not require nor did it refer to the taking of soundings in the project area:

11. On August 18, 1954, the Contractor's representative informed Leonti that the Contractor proposed to take soundings in Bay 9 on August 20, 1954. Leonti was informed that the Contractor intended to take a tug and barge out on the water below the dam to push the barge into Bay 9, and to take soundings off the side of the barge. The Contractor requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P.M. of August 20, 1954, to facilitate the sounding operation. The Contractor did not request any gates to be closed other than 9 and 10. Leonti forwarded this request to the operations division of the dam and by 12:30 P.M. of August 20th, the gates in these bays had been closed. With the closure of Gates 9 and 10, Gates 9 through 17 were closed. The Contractor sought no advice from the defendant and the defendant gave the Contractor no advice as to the hazards of the proposed sounding operation.

12. The day before the proposed sounding op-

eration, the superintendent of the independent contractor performed a reconnaissance run in another tugboat in the same area on the Columbia River in which the accident occurred for the purpose of determining whether the proposed sounding operation was safe. Based on this reconnaissance run and his own personal observation of this situation, the independent contractor determined for himself, without seeking the government's advice or suggestions, that the proposed sounding operation was safe.

13. Shortly before 2:00 P.M. on August 20, 1954, Contractor's Tug Muleduzer, pushing the Contractor's Barge Forest No. 12, set out from the Bradford Island shore of the river. The equipment and personnel utilized in the proposed sounding operation were selected solely by the Contractor. The tug's crew consisted of Magnor Larson, Captain, and Henry Coles, deckhand, both of whom were employees of the Contractor. Also aboard were the members of the sounding party, consisting of Graham, Boylan and Tobias and a man named Lewis. Graham, Boylan and Lewis were in non-supervisory capacities and had no control with respect to the manner in which the sounding operation was to be conducted. Tobias was Civil Engineer in charge of this sounding operation for his employer, the Contractor.

14. The Tug Muleduzer is 50 feet long, has a 15-foot beam, draws 5½ feet aft and 2½ feet forward. It has two No. 671 GMC 165 horsepower diesel

engines which drive two 4-bladed bronze propellers through 3 to 1 reduction gears. The tug was pushing the barge, which was made fast to the tug by four steel lines. Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug and the other two lines ran from the stern mooring bits of the barge to the stern winches of the tug. So fastened together, the tug and barge were in effect a unit.

15. The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed upstream for Bay 9. As the barge came to Bay 9, it veered north and the port bow of the barge struck the pier between Bay 9 and Bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved over in front of Bay 8 and the other open bays north of Bay 8. The barge and tug were swamped and sunk with the barge being broken to pieces. All those aboard the tug and barge were thrown into the water and all except Coles, the deckhand, were drowned.

16. The immediate cause of the accident and the deaths of the men was the turbulent condition of the water, which made it impossible to control the movements of the tug Muleduzer and barge and caused the barge to strike the pier.

17. At the time of the accident, Gate 8 was open two dogs so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; Gate 7 was open three dogs so that the

height of the aperture was 55 inches; Gate 6 was open two dogs so that the aperture was 32 inches high. These gates were all fifty feet wide and fifty feet high. The quantity of water being discharged from these gates at that time was approximately as follows: 5,700 cubic feet per second from Gates 8 and 6 and 9,100 cubic feet per second from Gate 7. At this time, the elevation of the forebay in the spillway dam was about 73.5 feet and the elevation of the tailrace below the spillway dam was 18.6 feet. The elevation of the crest of the ogee at the spillway dam was about 24 feet, as measured from a fixed reference point at the dam. All elevations are measured from a fixed reference point at the dam.

18. At the time of the accident, on August 20, 1954, the flow of the Columbia River was 191,100 cubic feet per second. Of this flow, 115,000 cubic feet per second was taken through the powerhouse, 52,300 cubic feet per second was being discharged through the spillway dam, 3,000 cubic feet per second passed over the fishway and 800 cubic feet per second was being ponded.

19. The turbulent condition of the water in the spillway basin was open, apparent and obvious to all, including the independent contractor, the operator of the tugboat and the other employees of the independent contractor. The difference in elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates in the spillway basin was also visible and obvious.

20. This accident and the deaths of the decedents occurred on navigable waters of the United States within the jurisdiction of the State of Oregon.

21. Robert C. Larson, doing business as Larson Construction Company, was an independent contractor and was not operating under the supervision, control and direction of the United States.

22. The government was under no duty by virtue of this contract, to provide the independent contractor with any materials, equipment or personnel. The government had no control of the details, manner or method by which the work under the contract was to be accomplished, but was interested only in the general result in conformity with the contract's specifications. The government retained a mere right to inspect the work of the independent contractor as it progressed in order to determine whether it was being completed in accordance with the plans and specifications.

23. The independent contractor selected its own equipment, including the tug and barge, and personnel for the proposed sounding operation and determined for itself the method, manner and means by which it would be carried out. No employee of the United States participated in this operation or gave the contractor or any of his employees any directions or orders with respect to the same.

24. There were no employees of the United States engaged in the sounding operation which resulted in the deaths of plaintiffs-decedents. There was no intermingling of employees of the United States

with employees of the independent contractor in connection with the work being performed at the time of the deaths of plaintiffs-decedents.

25. The government was not in charge of, responsible for or engaged in the work being performed by the independent contractor which resulted in the fatal accident.

26. Neither the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing the deaths of plaintiffs-decedents.

27. Defendant was not an employer subject to the provisions of the Oregon State Workmen's Compensation Act.

28. Plaintiff-decedent Merle L. Tobias was the foreman in charge of and responsible for the particular work in which he and the other employees of the contractor were engaged at the time of the fatal accident.

29. The Contractor at the time of the death of Graham, Boylan and Tobias was insured by a qualified carrier against liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Neither the insurer nor the Contractor had given notice to the Deputy Commissioner that such insurance was in force and the Contractor had not otherwise secured the payment of such compensation as provided in 33 U.S.C. § 932. The statutory beneficiaries of plaintiffs-decedents, pursuant to their application, were

awarded and are presently receiving compensation under the Oregon Workmen's Compensation Act.

30. The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act of plaintiffs-decedents did not file any application for compensation under that Act, nor have they been awarded nor have they received any compensation under that Act.

31. The beneficiaries under the Longshoremen's and Harbor Workers' Compensation Act have not filed with or given notice to the Deputy Commissioner of the Bureau of Employees' Compensation of an election to bring an action for damages against some person other than the employer of plaintiffs-decedents as provided in 33 U.S.C. § 933(a).

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter of these actions.

2. Plaintiffs are not barred from bringing these actions by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

3. These actions for damages for the deaths of workmen occurring on the navigable waters of the United States within the jurisdiction of the State of Oregon are governed by the general maritime law, which applies within the jurisdiction of Oregon the Oregon Wrongful Death Statute, O.R.S. 30.020, but not the Oregon Employers' Liability Act, O.R.S. 654.325.

4. It would violate the United States Constitution to apply the Oregon Employers' Liability Act to these actions.

5. The United States was not responsible for the work being performed by plaintiffs-decedents so as to be liable to them under the Oregon Employers' Liability Act.

6. The Oregon Employers' Liability Act does not apply to these actions.

7. The deaths of plaintiffs-decedents were not caused by the negligence of the United States or its employees.

8. The United States is not chargeable with any negligent acts or omissions on the part of the independent contractor or his employees.

9. There was no breach of any duty owing from the United States or its employees to plaintiffs-decedents.

10. The United States is not liable to plaintiffs under either the Oregon Employers' Liability Act or the Oregon Wrongful Death Act.

11. The United States is not liable to plaintiffs under the Federal Tort Claims Act.

12. The United States is entitled to judgment.

Let judgment be entered accordingly.

These findings of fact and conclusions of law are in accordance with the Pretrial Order on Segregated Issues of Law, the pleadings, the record made

on the trial of these actions and the opinion of the Court filed in these consolidated cases.

Dated this 9th day of May, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 9, 1957.

In the United States District Court
for the District of Oregon

Civil 8041

HENRY L. HESS, JR., as Administrator of the Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8076

JAMES L. WINTON, as Administrator of the Estate of Leonard L. Boylan, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8256

JESSIE G. TOBIAS, as Administratrix of the Estate of Merle L. Tobias, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT

These cases (Nos. 8041, 8076 and 8256) were consolidated for trial before this Court, the Honorable

Gus J. Solomon presiding and sitting without a jury, the Court having previously reserved its decision on the questions of law submitted to it by the parties in connection with the Pretrial Order on the Segregated Issues of Law. The parties appeared by their respective counsel on December 3, 1956 and introduced evidence, both oral and documentary. The cases were briefed, argued and submitted to the Court for consideration and decision. After due consideration, the Court, being fully advised and having reached its decision and having made and filed its opinion and findings of fact and conclusions of law,

It is Hereby Ordered, Adjudged and Decreed that the plaintiffs and each of them take nothing by these actions.

Made and Entered this 9th day of May, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed May 9, 1957.

[Title of District Court and Causes.]

MOTION TO AMEND FINDINGS OF FACT AND OBJECTIONS TO CONCLUSIONS OF LAW

Come now plaintiffs pursuant to Rule 52 (b) of the Rules of Civil Procedure for the District Court, and move the Court as a separate motion by each paragraph and subparagraph hereinafter set forth,

to amend its findings made and entered in the above-entitled case, and to make other and additional findings as follows:

(1) To amend finding number 19 by adding thereto the following:

(a) "There is no evidence that the decedent George William Graham knew which bay the tug was going into with reference to its proximity to the nearest open gate, the power of the water and/or the power of the tug itself."

(b) "There is no evidence that the decedent Leonard L. Boylan knew which bay the tug was going into with reference to its proximity to the nearest open gate, the power of the water and/or the power of the tug itself."

(c) "There is no evidence that the decedent Merle L. Tobias knew which bay the tug was going into with reference to its proximity to the nearest open gate, the power of the water and/or the power of the tug itself."

(2) To amend finding number 19 by adding thereto the following:

After boarding the tug Muleduzer and putting out into the Columbia River the plaintiffs' decedents (a) Graham, and (b) Boylan, and (c) Tobias, were no longer in control of the situation and could not have turned back had they desired so to do.

(3) To amend finding number 23 by adding thereto the following:

(a) "The United States was however kept informed of the plans of the Contractor and knew of

the Contractor's plans to send his employees into Bay 9 in time to have closed Gate 8."

(b) "and it would have been practicable so to do without impairing the efficiency of the operations of the United States in the operation of said dam."

(4) To delete from finding number 24 the second sentence thereof and substitute the following:

"At all times material hereto the defendant was in full and absolute control of the situs of the work being performed by Contractor, the defendant's employees were in full charge of the operation of the dam, and the work being done by the Contractor would necessarily be affected by the actions of the defendant's employees in the operation of said dam."

5. To amend finding number 25 by adding thereto the following:

(a) "The government was however in the operation of its dam and in the production and transmission of electricity, an employer engaged in, in charge of, and responsible for, work involving risk and danger to employees and the public."

(b) "and the work being performed by the plaintiffs' decedents brought them withn the scope of the danger created through the operations of the government in the operation of its dam."

6. To amend the Court's findings by deleting therefrom in its entirety finding number 26 as made, and substituting therefor the following:

(a) "The United States acting through its servants and agents owed a duty at common law to the

plaintiffs' decedents to conduct its own operation of the dam with due care and regard for the safety of plaintiffs' decedents, this the United States failed and neglected to do and the defendant is therefore guilty of negligence as at common law for failure to exercise reasonable care in view of the circumstances and the actual state of the defendant's knowledge regarding the plans of the Contractor."

7. The defendant was also guilty of negligence in violating the provisions of the Employees Liability Act of Oregon, O.R.S. 654.325, et seq. in that it failed to use every device, care, and precaution practicable to be used for the protection of Contractor's employees' lives and limbs in that it would have been practicable without impairing the efficiency of the defendant's operations,

(a) to have closed gate eight for a sufficient time to have allowed Contractor's employees to perform the duties assigned them in bay nine.

(b) to have furnished a safe working pool

but the defendant failed so to do.

8. The negligence of the defendant, as aforesaid, was the proximate cause of the death of

(a) George William Graham
(b) Leonard L. Boylan
(c) Merle L. Tobias

And plaintiffs object to the Court's conclusions of law number 3 insofar as it concludes that the Oregon Employers Liability Act, O.R.S. 654.325

cannot or should not be applied to the facts of this case; conclusion number 4 in its entirety; conclusion number 5 insofar as it concludes that the defendant must have been in charge of the particular work being performed by plaintiffs' decedents in order to make the Oregon Employers Liability Act O.R.S. 654.325, et seq. applicable to the facts of this case; and conclusions numbered 6, 7, 9, 10, 11, and 12 in their entirety all for the reason and upon the grounds that the same are contrary to law and not in accordance with the facts.

/s/ GEORGE H. FRASER,
Of Attorneys for James H. Winton.
/s/ CLAYTON HESS,
Of Attorneys for Henry L. Hess, Jr.
/s/ RAY MIZE,
Of Attorneys for Jessie G. Tobias.

State of Oregon,
County of Multnomah—ss.

Due service of the within Motion to Amend Findings of Fact and Objections to Conclusions of Law is hereby accepted in Multnomah County, Oregon, this 17th day of May, 1957, by receiving a copy thereof, duly certified to as such by Clayton Hess of Attorneys for Henry L. Hess, Jr.

/s/ C. E. LUCKEY,
Of Attorneys for Defendant, United States of America.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Causes.]

ORDER

This matter having come on regularly upon the motion of plaintiffs to amend the Findings of Fact and upon plaintiffs' objections to the Conclusions of Law, plaintiff Henry L. Hess, Jr. appearing by his attorney, Clayton Hess, plaintiff James L. Winton appearing by his attorney, Geoffrey C. Hazard, Jr., and plaintiff Jessie G. Tobias appearing by her attorney, Ray Mize, and the defendant appearing by Robert R. Carney, Assistant United States Attorney, and the Court having heard argument of counsel and being fully advised in the premises;

It Is Ordered that the motion of plaintiffs to amend the Findings of Fact and its objections to Conclusions of Law be and the same are hereby denied.

Dated this 27th day of May, 1957.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed May 27, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8041

HENRY L. HESS, JR., as Administrator of the Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

NOTICE OF APPEAL

To United States of America and C. E. Luckey, United States Attorney for the District of Oregon, and Robert R. Carney, Assistant United States Attorney, its attorneys:

Notice Is Hereby Given, that Henry L. Hess, Jr., as administrator of the Estate of George William Graham, Deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from each and every part of that certain judgment in favor of defendant entered in this action on the 9th day of May, 1957, and from the whole thereof, and from that certain Order Denying Motion of Plaintiff to Amend Findings of Fact and Objecting to Conclusions of Law, entered on the 27th day of May, 1957, and from the whole thereof.

Dated: July 9, 1957.

/s/ CLAYTON HESS,
Of Attorneys for Plaintiff-Appellant.

[Endorsed]: Filed July 23, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents that Henry L. Hess, Jr., as administrator of the estate of George William Graham, deceased, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized and empowered under the laws of the State of Oregon to become surety on bonds, undertakings, etc., in the State of Oregon, are held and firmly bound jointly and severally unto defendant above named in the penal sum of Two Hundred Fifty and No/100 ($250.00) Dollars to be paid to said defendant, its successors and assigns, for which payment well and truly to be made said Henry L. Hess, Jr., as administrator of the estate of George William Graham, deceased, and said Fidelity and Deposit Company of Maryland, and each of them, bind themselves, their successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such that Whereas said Henry L. Hess, Jr. as administrator of the estate of George William Graham, deceased, is about to prosecute an appeal to the United States Court of Appeals for the Ninth Circuit from a Judgment in favor of defendant, entered in the above-entitled action on the 9th day of May, 1957, and from the whole thereof, and from that certain Order Denying Motion of Plaintiff to Amend Findings of Fact and Objecting to Conclusions of Law, entered on the 27th day of May, 1957,

entered in the above-entitled action, and from the whole thereof.

Now, Therefore, if said Henry L. Hess, Jr., as administrator of the estate of George William Graham, deceased, shall prosecute said appeal to effect, and answer for all costs which may be adjudged against him if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, Sealed and Delivered this 28th day of June, 1957.

/s/ HENRY L. HESS, JR.,
As administrator of the estate of George William Graham, deceased.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
/s/ By CLARENCE D. PORTER,
Attorney in Fact.

Countersigned:
/s/ CLARENCE D. PORTER,
Resident Agent.

[Endorsed]: Filed July 23, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now, plaintiff-appellant, Henry L. Hess, Jr., as Administrator of the Estate of George William Graham, Deceased, and files the following

statement of points upon which he intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of defendant, and from the order of the court overruling plaintiff's motion to amend the findings of fact and objecting to the conclusions of law, which judgment and order were made and entered herein:

1. The court erred in entering judgment in favor of the defendant.

2. The court erred in overruling plaintiff's motion to amend the findings of fact and objecting to the court's conclusions of law.

3. The court erred in finding, if it did so find, in Finding of Fact number 22 that the defendant retained only a mere right to inspect the work done by Larson Construction Company in the particular circumstances in which plaintiff's decedent was killed, namely, the danger involved in the open spillway gates.

4. The court erred in finding in Finding of Fact number 24 that there was no intermingling of employees of the United States with the employees of the contractor in connection with the work being performed at the time of the death of plaintiff's decedent.

5. The court erred in finding, if it did find, in Finding of Fact number 25 that the defendant was not in charge of, responsible for, or engaged in work involving risk and danger to employees of Larson Construction Company, including plaintiff's decedent.

6. The court erred in finding in Finding of Fact number 26 that the defendant was not guilty of any negligent or wrongful act or omission proximately causing the death of plaintiff's decedent.

7. The court erred in concluding in Conclusion of Law number 3 that this action was governed by the general maritime law which applies the Oregon Wrongful Death Statute rather than the Oregon Employers' Liability Act, O.R.S. 654.325.

8. The court erred in concluding in Conclusion of Law number 4 that it would violate the United States Constitution to apply the Oregon Employers' Liability Act to this action.

9. The court erred in concluding in Conclusion of Law number 5 that the United States was not responsible for the work being performed by plaintiff's decedent so as to be liable to him under the Oregon Employers' Liability Act.

10. The court erred in concluding in Conclusion of Law number 6 that the Oregon Employers' Liability Act does not apply to this action.

11. The court erred in concluding in Conclusion of Law number 7 that the death of plaintiff's decedent was not caused by the negligence of the United States or its employees.

12. The court erred in concluding in Conclusion of Law number 9 that there was no breach of any duty owing from the defendant or its employees to plaintiff's decedent.

13. The court erred in concluding in Conclusion of Law number 10 that the United States was not liable to plaintiff under either the Oregon Employers' Liability Act or the Wrongful Death Act.

14. The court erred in concluding in Conclusion of Law number 11 that the United States was not liable to plaintiff under the Federal Tort Claims Act.

15. The court erred in concluding in Conclusion of Law number 12 that the United States was entitled to judgment in the above entitled action.

/s/ CLAYTON HESS,
Of Attorneys for Plaintiff-Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 12, 1957.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now, Henry L. Hess, Jr., as Administrator of the Estate of George William Graham, Deceased, the plaintiff-appellant, and pursuant to Rule 75 of the Rules of Civil Procedure designates the following portions of the record, proceedings and evidence to be contained in the record on appeal.

1. Complaint.

2. Answer.

3. Stipulation for consolidation, filed February 28, 1956.

4. Pre-Trial order on segregated issues of law.

5. Stipulation of facts dated December 3, 1956.

6. Opinion, March 29, 1957.

7. Findings of fact and conclusions of law.

8. Judgment in favor of defendant.

9. Motion to amend findings of fact and objections to conclusions of law.

10. Order denying motion to amend findings of fact and objections to conclusion of law, May 27, 1957.

11. Notice of appeal.

12. Bond for costs on appeal.

13. Concise statement of points on which plaintiff-appellant intends to rely on appeal.

14. This designation of contents of record of appeal.

15. Condensed statement of testimony of Henry A. Coles, Kurt H. Sicke, Albert M. Capps and Patrick J. Leonti.

16. To be transmitted as physical exhibits, the following: Plaintiff's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16 and 17.

/s/ CLAYTON HESS,
Of Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Stipulation re consolidation of cases; Order consolidating cases; Pre-trial order on segregated issues of law; Stipulation of testimony of Harry Claterbos, Jr.; Stipulation of facts; Opinion of Judge Gus J. Solomon; Findings of fact and conclusions of law; Judgment; Motion to amend findings of fact and objections to conclusions of law; Order denying motion to amend findings of fact and its objections to conclusions of law; Notice of appeal; Bond for costs on appeal; Statement of points on which appellant intends to rely on appeal; Condensed statement of testimony; Designation of contents of record on appeal; Order for transmission of exhibits; Objections to narrative statement of testimony; Designation of additional portions of record to be included in the record on appeal; Order to forward exhibits to Court of Appeals; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8041, in which Henry L. Hess, Jr., Administrator of the Estate of George William Graham, Deceased, is the plaintiff

and appellant and The United States of America is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's partial transcript of proceedings of December 3, 1956. Exhibits 1 to 8; 10 to 19; 21; 22; 23 a, b, c, d; 24; 25; 26; and 27 will be forwarded under separate cover.

I further certify that the cost of filing the notice of appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of August, 1957.

[Seal] R. DE MOTT,
Clerk,

/s/ By THORA LUND,
Deputy.

United States District Court
District of Oregon

Civil 8041

HENRY L. HESS, JR., as Administrator of the Estate of George William Graham, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8076

JAMES L. WINTON, as Administrator of the Estate of Leonard L. Boylan, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil 8256

JESSIE G. TOBIAS, as Administratrix of the Estate of Merle L. Tobias, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, Monday, December 3, 1956

Before: Honorable Gus J. Solomon, District Judge. [1]*

Appearances: Mr. Clayton R. Hess, Attorney for Plaintiff Henry L. Hess, Jr., As Administrator of

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

the Estate of George William Graham, Deceased; Messrs. George H. Fraser and Geoffrey C. Hazard, Jr., of Attorneys for Plaintiff James L. Winton, As Administrator of the Estate of Leonard L. Boylan, Deceased; Mr. Herman P. Hendershott, of Attorneys for Plaintiff Jessie G. Tobias, As Administratrix of the Estate of Merle L. Tobias, Deceased; Messrs. Robert R. Carney, Graydon S. Staring, and Clifford C. Comisky, appearing in behalf of Defendant United States of America.

Court Reporter: Mr. Gordon R. Griffiths.

Mr. Carney: If the Court please, there are perhaps some preliminary matters. At this time I am handing up stipulations as to the facts because there is not a pretrial order in this case. The first document is a stipulation. It does not stipulate all of the admitted facts. The second is a stipulation as to the testimony of the witness Harry Clatterbos as to what he would testify if he were present today. We are not stipulating that they are the facts but that that would be his testimony. [2]

There is one other preliminary matter, and that is in order to clarify the record with respect to the Court's action on the segregated issues which were previously argued. If my recollection is correct, the Court took some of those under advisement and may have ruled on the first one. We thought it might be appropriate at this time to clarify the record in that regard so we would know what issues remain in the case. The first, really the first two segregated issues, pertained to the Longshoremen's and Harbor Workers' Act. The first issue was

whether or not this accident would be exclusively covered by the Longshoremen's Act. The second issue was whether it was necessary for the plaintiffs to have filed a notice of action against the third party with the Deputy Commissioner.

Do I understand correctly as to whether or not the Court has ruled on those issues, or have they been reserved, also?

The Court: No, I ruled on them. I ruled that this action could be maintained without having given notice to the Deputy Collector.

Mr. Carney: Well, then, the remaining point that has not been ruled on is the application or non-application of the Oregon Employers Liability Act to these circumstances, and that question has been reserved?

The Court: That is right. [3]

Mr. Carney: In order to preserve the record we desire to preserve the pre-trial on the segregated issues with the understanding that two of the questions have been ruled upon, and if it is necessary or appropriate to take exception for the record, we do that.

The Court: No, in my decision, whatever it may be, I am going to call attention to the issues. If I have the time, you will get a full-dress opinion on that point because it is an interesting question.

Mr. Carney: There is one other matter, a matter of formality. There are seven exhibits attached to the pre-trial as to the segregated issue. I believe all the parties desire to stipulate that those seven exhibits will remain part of the record and will be-

come the first seven exhibits at this trial. Is that so stipulated?

Mr. Hazard: Yes.

Mr. Hess: Yes.

Mr. Hendershott: Yes.

Mr. Carney: There is one other preliminary matter. I discussed it with attorneys for the plaintiff, and I understand that they are prepared to stipulate at this time that the contractor, Robert C. Larson, was an independent contractor in this case.

Mr. Hazard: So stipulated.

Mr. Hess: So stipulated. [4]

Mr. Hendershott: So stipulated.

The Court: So stipulated.

(Recess taken.)

HENRY A. COLES

a witness produced in behalf of Plaintiff Henry L. Hess, Jr., as Administrator of the Estate of George William Graham, Deceased, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hess): What is your address?

A. 16366 Southeast Alder.

Q. And your occupation?

A. Tugboat operator, tug operator.

Q. How long have you followed that occupation, Mr. Coles?

A. Oh, I have been operating tugboats for about a year and a half now. I was decking for approximately four years.

(Testimony of Henry A. Coles.)

Q. On August 20, 1954, what was your occupation? A. As a deck hand.

Q. How long had you been following the river and maritime employment before that?

A. Approximately four years.

Q. On August 20, 1954, you were employed by whom? [5]

A. Larson Construction Company.

Q. On that date what job did you have to handle?

A. Well, I was working as a deck hand on the Tug Muleduzer.

Q. Had the Tug Muleduzer been assigned any particular duty for that day? A. Yes.

Q. Would you state what you were to do on the tug that day?

A. We were to bring the barge from the upper forebay of the dam.

Q. You are referring to Bonneville Dam?

A. Bonneville Dam, yes, and we were to bring it around to below the spillways and tie it up at the Derrick Columbia, and then we were to pick up a crew from shore and take them out with the barge and take some soundings of the spillway of the dam.

Q. Approximately what time of the day did you start your trip from the forebay?

A. It was right around noon.

Q. You had reached the position below the dam about what time?

A. Oh, about quarter to one.

(Testimony of Henry A. Coles.)

Q. Was it below the dam that you tied onto the barge that was involved in this accident?

A. Well, the first time?

Q. Where did you tie on, and about what time and how did you [6] tie on for the trip out along the face of the dam that resulted in this catastrophe?

A. Well, that was, oh, approximately a quarter to two we picked up a crew from shore, and then we went back out to the Columbia where this barge was tied off, and we made up to the barge.

Q. Would you describe how you made up to the barge?

A. Well, the barge was laying up and downstream, and, as we wanted to go downstream and make an upstream approach, we secured the upstream end of it. We ran out two bow lines, steel cable bow lines to cleats on each corner, and then there were two steel lines from the stern to the same cleats on the corner of the barge, which gave us four lines holding the barge and boat together as a single unit.

Q. After you had made up the barge with the tug, would you describe the course you took to proceed out, and, incidentally, where were you to proceed to first?

A. There was a marking on the dam, and we were to proceed into the bay that was to the right of this marking, and we were to hold the barge in there and take soundings of the curvature of the dam.

(Testimony of Henry A. Coles.)

Q. What was the condition of the dam with reference to whether or not the gate was open on the gate immediately to the north of the bay into which you were to proceed?

A. It was open. [7]

Q. Will you describe the course taken by the tug and barge in the trip out to that bay?

A. Well, we cut loose the barge from the derrick, and we proceeded downstream and made a turn to the right, swinging around, coming back upstream, and we were off to the Oregon side, and we proceeded on kind of an angle towards the Washington side, allowing for the turbulent current in there and wind because there was a certain amount of set that they had to allow for, and by the time we got up to the bay we had slid just right and entered right into the bay there.

Q. You were not then proceeding straight upstream at this time?

A. No, it would have been impossible to have made a proper landing in there.

Q. Why would that be?

A. Why, if you would come up there straight up there, your current and your wind would set you sideways. You would have to turn your barge, and you would be all out of shape and wouldn't be able to make a proper landing. You would come in at an angle and damage your barge. This way, if you would come and set sideways, you would come right in there, and the full weight of the barge would hit all at the same time, and you wouldn't do damage to your barge.

(Testimony of Henry A. Coles.)

Q. As you proceeded upstream at this angle toward Bay 9—what was your position on the tug or barge as you proceeded? [8]

A. At the time we approached the dam I was up forward on the barge.

Q. Would you be forward on the barge or to the rear of the barge?

A. Well, I would be up forward, pretty near as far forward as I could get there where I could watch.

Q. As you proceeded at this angle into Bay 9 did you observe whether or not there was a drift one way or the other?

A. Well, not until we got, oh, to within maybe a hundred yards of the dam.

Q. When you got within a hundred yards, what did you observe?

A. Well, we was moving too fast, for one thing, to come into a landing like that, and I motioned to the skipper to lay off, and he kept moving at about the same rate of speed, and I motioned him to back up, and we didn't seem—our boat didn't seem to slow down any too much.

Q. Could you tell whether or not he had done anything to the motors to slack up or back up?

A. Well, you could tell when he slacked down there from the forward pushing motion, but as far as putting it in reverse and throttling up, it would be kind of hard to tell right there under those conditions of your noise and water and such.

Q. Do you have any signals that you give to

(Testimony of Henry A. Coles.)

indicate to [9] the skipper to slow up and back up, and if so what are those signals?

A. Well, usually in coming in for a landing I will just motion, you know, left or right or which way I want him to turn. If I want him to let her drift, I just give a signal like that (indicating). If I want to back up, I put my hand like that (indicating). If I want him to speed up, I go like that (again indicating).

Q. Was it the practice for the skipper to obey these signals? A. Yes.

Q. As you were approaching there, did you notice whether or not there was a drift either toward the right toward the Oregon shore, or a drift toward the left toward the Washington shore?

A. A drift toward the Washington shore, that's right, the Washington shore, forward towards the Washington shore in toward the turbulent water.

Q. Will you just describe in your own language the actions of the tug and barge, then, from this point of approximately a hundred yards when you noticed that you thought you were coming in there too fast.

A. Well, when I noticed that we were coming in too fast I motioned to Mag. to put the engines in reverse.

Q. Mag., by that you refer to Magner Larsen?

A. Yes, the skipper. [10]

Q. Go ahead.

A. To put the engines in reverse and to back up on her, and I seen that we were still moving

(Testimony of Henry A. Coles.)

pretty fast, so I give him the hi-ball sign to open her up, and by that time we had moved in pretty close, and it didn't seem to have slowed it down any, and in the last desperation I just really opened her up to give her everything she had got, and that was just before we hit the pier on the dam, and when we hit we hit with force enough that I could hear the timbers breaking in the front of the barge.

Q. What portion of the barge hit the dam?

A. Oh, I would guess probably, oh, maybe 10 feet in from the left-hand corner.

Q. It hit what portion of the dam?

A. On one of the piers that come down, the cement piers.

Q. Before you hit the dam what, if anything, did you observe with reference to the condition of the water?

A. Oh, it was rough, turbulent. That was immediately below the spillway there.

Q. How would you characterize that turbulence? Would you say it was mild, severe, heavy, or what?

A. Well, if you got into it, it would be severe.

Mr. Carney: I object to that. I think he can describe it without expressing an opinion as to some non-technical term as to the degree of turbulence. [11]

The Court: Objection overruled. Go ahead and testify. What was the degree of turbulence?

The Witness: Oh, it was, up close to the dam it was plenty rough in there. It was rough when you go to get into it with a boat.

(Testimony of Henry A. Coles.)

Q. (By Mr. Hess): Did you observe anything with reference to the current of the river as to whether it was flowing downstream at that portion, back toward the dam in a circular motion, or what?

A. Well, farther down from the dam, say a hundred or two hundreds yards, your current was going downstream—well, probably closer than that, and the closer you got your water started to boil, and the closer you got to the dam, why, then, she kind of boiled and rolled back in towards the face of the dam.

Q. With particular reference to where the tug and barge were located, were you in the place where the water was going downstream, or were you in a place where the water was boiling back toward the dam?

A. Well, right where, say, about the stern end of the tug it would—I would say it would be kind of about medium right there. I mean your water would be boiling. It would be going neither forward or back maybe. It would put us about 100 to 130 feet from the face of the dam; maybe not that much; 120 feet. [12]

Q. That is when you say you were back 130 feet from——

A. I think, but the power of your boat, where your propellers are at, that is where all your power is at.

Q. I take it you are saying that the stern of the tug would be about 130 feet back from the face of the dam at the time you bumped; is that correct?

(Testimony of Henry A. Coles.)

A. Yes, sir.

Q. After you bumped the dam, will you describe the action of the barge and the tug?

A. Well, immediately after hitting, the barge bounced back to a certain extent, and I ran back to the boat, knowing that we had already stove a hole in the barge, and went back to tell the skipper that we should get her ashore, beach it, you know, before the barge would sink; and I ran back and told him that, and as I turned around and looked the barge had started to work its way underneath the spillway. It was being pulled underneath, and then I ran around behind the cabin and grabbed an ax and came back up forward, showed the skipper I had an ax in my hands ready to cut the lines loose, and we stood there for a moment or so and the barge kept being pulled right underneath the dam, and the boat swung in right alongside it parallel with the dam.

Q. When you say the barge was being pulled under the dam, being pulled by what, what factor?

A. With the force of your flow. In some way the turbulence [13] of the water was sucking it right underneath.

Q. After you observed this action of it being pulled under the face of the dam, I take it you are talking now about the spillway dam? A. Yes.

Q. And water spilling out of the dam?

A. Yes.

Q. Was it actually spilling onto the barge at that time? A. Yes.

(Testimony of Henry A. Coles.)

Q. After you observed that, will you continue with your narrative.

A. Well, after we were pretty near parallel with the dam the skipper gave me a signal to go ahead and cut the lines, and being a danger to the stern hitting the piers and the dam there and damaging the wheels and losing all control of the boat in there, I cut the starboard stern line first, which would allow our stern to swing downstream and keep the propellers away from any piers, in halfway decent water, and then I tried to cut the port stern line, and we were bouncing around pretty good then.

Q. I couldn't hear you?

A. After cutting the starboard stern line, then I went and tried to cut the port stern line, and it had gone slack. It was a little difficult for me to try to cut it by myself, and Mr. Tobias grabbed hold of the cable and held it straight [14] so that I could cut it, and I cut the port stern line, and then I went forward and tried to cut the bow lines.

By that time the barge was pulled under the dam, and it was pretty much, quite a ways underneath there, and it was so rough that if I had let go of the railing of the boat and tried to jump off forwards to the bow and severed those lines with an ax I would not have been able to stand up and take a swing with the ax anyway.

Q. This roughness that you describe, was that up and down, sideways; both?

A. It was up and down more or less.

(Testimony of Henry A. Coles.)

Q. Approximately how high were you going up and coming down, would you say?

A. Oh, I would guess about probably five or six feet.

Q. Was that a fast or slow action?

A. Well, it wasn't either one. It was just kind of the boat would go up, the barge would go down, and the barge would go up and the boat would go up, and the cables would come up taut on it and jerk, and with the hope that those bow cables would break at that time under those conditions. They should have and usually do. We have had them break under a lot less roughness than that, the waves of a ship break them, but this time they didn't.

Q. Then you went forward, did you, in an attempt to sever some of the bow lines? [15]

A. That was my intentions, yes.

Q. Were you able to get those severed?

A. No.

Q. What prevented you from severing them?

A. The roughness of the boat. I couldn't have stood up or took a swing with that ax if I wanted to. It would have just either throwed me overboard or throwed me down on the deck. I would not have been able to do no good.

Q. Was this a continuous process of the tug and barge being continually sucked under or——

A. All the time, yes.

Q. Would you describe what happened then

(Testimony of Henry A. Coles.)

after you went forward and tried to sever the bow lines?

A. Well, seeing that I couldn't stand up and do any good, I just grabbed hold of the railing on the front of the bow and just hoped that those lines would part from that violent surge of the water and the boat going up and down, and they didn't, and the first thing, you know, the water hit the side of the boat and threw me into the water right into the dam.

Q. The water that you are speaking of, was that the water from the Gate 8 that was open?

A. Yes.

Q. Mr. Coles, you have testified with reference to the condition of the water at the stern of the tug at the time [16] you hit the pier, but I believe you testified further that the tug and barge got swung around so that it was almost parallel to the face of the dam. Would you describe the condition of the water as you observed it to be as you got alongside of the dam, parallel to the dam?

A. Well, I would say that it wasn't too bad. If we could have got the boat cut loose, it probably would have backed out of there.

Q. What was that?

A. I say, if I had got the boat cut loose, it probably would have been able to back out of that type of water where the stern was in at that time. It wasn't so—as turbulent. It was kind of——

Q. But what was the action of the water at the

(Testimony of Henry A. Coles.)

spot where the barge was? In other words, what was the motion of the water?

A. At what time?

Q. As the tug and barge swung parallel to the dam after having holed the barge. A. Yes.

Q. What was the action of the water where the barge was in front of the closed gate?

A. Well, it wasn't—it was kind of whirlpools. It wasn't turbulent water.

Q. And the whirlpool was moving in what direction? [17]

A. Well, I never paid that much attention to it. I didn't take time to see which direction they were going.

Mr. Hess: You may inquire.

Cross Examination

Q. (By Mr. Carney): Who was aboard the tug and barge on the day that you went on this operation?

A. Mag. Larsen, the skipper, myself, Mr. Tobias, Boylan, Lewis and Graham.

Q. Which of these people consisted of the crew of the tugboat? A. Mr. Larsen and myself.

Q. There was no other deck hand besides yourself on the tugboat? A. No.

Q. Who was in charge of the party; that is, who was the party who gave the captain of the tugboat directions as to what to do?

A. Mr. Tobias.

Q. What did he say? Did you hear a conversa-

(Testimony of Henry A. Coles.)

tion between Tobias and Magner Larsen, the captain of the tugboat? A. Yes.

Q. What did he tell him to do?

A. Well, he explained what he was supposed to do, was to [18] take the barge out there and put it into this bay which was—at the time he pointed out it was—a pier out there had a yellow mark on it, and we was to put it into the bay to the right of that, and in that way we couldn't make mistakes, and it happened to be the one just to the right of the first active spillway of the dam at that time, and I was standing there, I usually tried to listen to the instructions given to Mr. Larsen because at times he may be a little confused. He would ask me if I heard, and if I did I would tell him, and that way both of us would know what was going on.

Q. Then is it correct that Tobias told him to put the barge into the first bay that was not spilling water?

A. That would be about it, yes. He never said those exact words.

Q. Is the result that it was the first bay that was not spilling water?

A. Well, I was definitely sure that he said to the right of the pier with the yellow mark, which was the one that was—it was the first dead bay towards Oregon from the Washington side.

Q. What kind of lines were used to tie the tug and barge? A. Steel cable lines.

(Testimony of Henry A. Coles.)

Q. How many axes were there aboard the tugboat? A. Two.

Q. Were any instructions given by you or the captain of the [19] tugboat, or Mr. Larsen, or anybody to any of the other people aboard in the use of the axes in case the situation became endangered? A. Not that I know of.

Q. What was your answer?

A. Not that I know of. Nobody got any instructions that I know of in the use of those.

Q. Were you present at all times?

A. Yes.

Q. Were any lines taken aboard the tugboat or the barge to be used to tie the barge into the bay by any means? A. No.

Q. By what method was the barge going to be held in this bay? A. By boat power.

Q. How long had you know Captain Magner Larsen, the captain of the tugboat?

A. I had know him about four years.

Q. How many years?

A. Approximately four years.

Q. Were you with him on the tugboat during those years? A. Yes; not continuously.

Q. Where were you operating?

A. Around Astoria, in Astoria and Portland.

Q. Had you ever operated in the upper reaches of the Columbia [20] River up around Bonneville Dam or any of the other dams? A. No.

Q. You were down on the tidal waters around Astoria? A. Yes.

(Testimony of Henry A. Coles.)

Q. Was it after a hole was stove in the barge that the barge took water and started to move north, or did it start to moving north before that?

A. Well, it was in the process of moving north when we hit.

Q. Well, then, what occurred immediately after you hit?

A. Well, just went back a little bit and continued going right in underneath and pulled in underneath the spillway.

Q. Was the barge taking water after it struck the pier?

A. Evidently. I couldn't swear to it. I didn't get down there and look.

Q. Were there any Government employes aboard the tug and barge at this time? A. No.

Q. Were there any Government employes present at the time the barge left the shore?

A. I don't believe so.

Q. Did any Government employes give either you or Captain Larsen any instructions before going out? A. No.

Q. How were the steel lines attached between the tugboat [21] and the barge?

A. Well, on the tug we have winches on there, hand winches, and they run out through blocks up to cleats on the barge, which we had eyes spliced in the end of the cables.

Q. Will you describe how these winches operated?

(Testimony of Henry A. Coles.)

A. They are a hand crank with a steel dog in them, and you just crank them up.

Q. Do these hand winches have a break on them? A. Yes.

Q. What was the condition of the brakes on these hand winches at the time of the accident?

A. Oh, they would work to a certain extent, like you could take—if you had a taut line, you would take a strain on your winch and pull your dog and hold your break back by hand and probably take your hand crank out and then release it.

Q. Were the hand winches, the brakes on the hand winches, in such condition that they could hold the strain of the line? A. No.

Q. In other words, to release the line from the winch it would be necessary to take a strain in order to get the dog out? A. Yes.

Q. What was your answer as to what was the condition of [22] the brakes?

A. They were satisfactory for so far as letting go under normal conditions, but in rough water, well, it would be kind of a touchy situation, a good chance of busting your arm.

Q. What was the condition as to how old they were? Were they worn? Were they new brakes?

A. Oh, no, no, no; the winches had probably been on there for probably four or five years or so, maybe longer. I don't know.

Q. Were the brakes pretty well worn? What was the condition of their wire?

(Testimony of Henry A. Coles.)

A. They were pretty well worn, yes.

Q. If the brakes had been in good condition, would it have been possible to hold a strain on the line with the brakes and then just simply reduce the dog by lifting it out?

A. Possibly. Under a jerking condition I don't know.

Q. After the Tugboat Muleduzer was raised following this accident did you continue to work on it? A. Yes.

Q. Was anything done to the winches that were aboard? A. Yes.

Q. What was done? A. We replaced them.

Q. I would like to hand you Exhibit No. 14. I don't believe [23] these exhibits have yet been marked, but perhaps during the recess we can take care of the marking.

The Court: Very well.

Mr. Carney: Pardon me; that is Exhibit 16. I ask that the witness be handed Exhibit No. 16.

(Exhibit referred to presented to the witness.)

Q. (By Mr. Carney): Does this picture represent what you observed as to the condition of the water immediately downstream from the spillway dam at the time of the accident?

A. I would say so, yes.

(Exhibit immediately above referred to was thereupon marked Government's Exhibit 16 for identification.)

The Court: I think we would be better off to

(Testimony of Henry A. Coles.)

pass the pictures at this time and go to something else. During the recess exhibit the pictures to counsel for plaintiff. Then we can proceed more quickly.

Q. (By Mr. Carney): Who was your employer? By whom were you employed at this time?

A. Larson Construction Company.

Q. Were any safety meetings held by Larson Construction Company in connection with this project? A. The work at the dam?

Q. Yes, the work at the dam. In other words, to rephrase my [24] question, prior to this accident were any safety meetings held which you attended which were held by your employer?

A. I believe there was one that I attended myself.

Q. Was there any discussion at this safety meeting with respect to the waters around the dam?

A. No, I don't remember. I couldn't recall.

Q. What was the subject—what was discussed at the meeting then?

A. Well, it was more or less the fellows, as far as their helmets and having to wear their lifejackets in working around the water, and there was some of the other shore union grievances, nothing to do with the towboat. We just stayed in there because we had to.

Mr. Carney: We have no further cross examination.

The Court: Let us take a recess until 1:30.

Mr. Hazard: Before we adjourn, your Honor, there is one other formal matter. I have made a typed copy of a regulation relating to navigation, 33 Federal Code Regulations, which Counsel previously agreed this could be introduced for judicial notice.

The Court: Very well.

(Noon recess taken.) [25]

Afternoon Session

(Court reconvened at 1:30 o'clock P.M., pursuant to the noon recess, and the trial of the matter was resumed as follows):

HENRY A. COLES

a witness produced in behalf of Plaintiff Henry L. Hess, Jr., thereupon resumed the stand and testified further as follows:

Further Cross Examination

Q. (By Mr. Carney): At this time would the witness be handed Exhibit No. 16. At this time the parties desire to stipulate that all of the exhibits that have now been marked, which are Nos. 1 through 26, be admitted without objection.

Mr. Hess: There was one question about that.

(Discussion by counsel off the record.)

Mr. Carney: Well, Exhibit No. 20 is a sealed exhibit for impeachment purposes only.

The Court: Then it is not admitted. Exhibit 20 is not admitted. It is just marked just as it is.

Mr. Carney: It is Defendant's Exhibit 20.

The Court: Your exhibit?

(Testimony of Henry A. Coles.)

Mr. Carney: Yes, your Honor.

The Court: Take it back.

Mr. Carney: There are two other clarifications, your [26] Honor. Exhibit No. 9, which is the deposition of Mr. Larson, is not admitted in evidence. It is an impeachment document, so I will hold it back.

Also, part of Exhibit No. 8; Exhibit No. 8 consists of three depositions. Two of the depositions, that of Patrick Leonti and that of Grover Goebel, are admitted as evidence. The third deposition in the same folder is that of Mr. Capps, which is simply for impeachment purposes because he may be called as a witness. There is no way to divide that conveniently.

The Court: Very well, 9 is not admitted; and 8, that portion of the exhibit relating to—give me the names.

Mr. Carney: Patrick J. Leonti and Grover Goebel.

The Court: Those are admitted. The other portion of the exhibit is not admitted.

(Defendant's Exhibits 1 through 7, inclusive, those parts of Defendant's Exhibit 8 dealing with the testimony of Patrick J. Leonti and Grover Goebel, and Defendant's Exhibits 10 through 19, inclusive, and Defendant's Exhibits 21 through 26, inclusive, having been previously marked for Identification, were thereupon received in evidence.)

[See Exhibit No. 8 at page 147.]

(Testimony of Henry A. Coles.)

Q. (By Mr. Carney): The witness has Exhibit No. 16, and I [27] will ask this question, as to whether this picture is a true representation of what you observed as to the condition of the water on the downstream side of the spillway dam on August 20, 1954, at the time of the accident which is the subject of this case?

A. Well, approximately. It could be a little more turbulent on this still-water side.

Q. A little more turbulent on the still-water side? A. Yes.

Q. That is the side which would be represented by the south side of the spillway dam?

A. That's right.

Q. I will hand you Government's Exhibit No. 15. To clarify your last answer, you said there was more turbulence on the south or Oregon side. Was that more turbulence in the picture or more turbulence at the time of the accident?

A. At the time of the accident.

Q. More turbulent at the time. In other words, was this turbulence visually observable?

A. Yes, it looked more choppy to me than what it does in this picture.

Q. You could observe the turbulence from the tugboat?

A. Well, I was out forward on the barge, yes, and from the tug.

Q. And from the tugboat, also. Referring you now to Exhibit [28] No. 15, I will ask you what does it represent?

(Testimony of Henry A. Coles.)

A. Well, that looks just about like approximately the day that we went up there, about the same conditions, except these gates here are closed (indicating on exhibit).

Q. Let me ask you this question: Aside from the fact that one or possibly two gates are indicated as being closed there on the north half of the dam, and referring your attention particularly to the water before the dam, does this picture truly represent what appeared and what you observed on the date of the accident?

A. Well, it would be kind of hard to say.

Q. With respect to what the water looked like.

A. It—well, yes, it would be approximately the same.

Mr. Carney: We have no further questions.

Redirect Examination

Q. (By Mr. Hess): Mr. Coles, from the time when the barge first hit the pier and stove a hole—and a hole was stoved in the barge, from that time until the time the tugboat moved under the flow of water from open gates and heeled over, about how much time would you say elapsed?

A. Not more than five minutes.

The Court: I didn't hear that. About five minutes?

The Witness: Not over five minutes. [29]

Q. (By Mr. Hess): Could you tell approximately how much time elapsed from the time you

(Testimony of Henry A. Coles.)

first hit the pier until water started spilling onto the barge?

A. Well, right after we hit a certain amount of water landed on the front of the barge. There was water coming down on it.

Q. Is that water from the spillway you are speaking about? A. Yes.

Q. Then this period of not more than five minutes that you are speaking of was the time that it took the flow of water to suck the tug all the way; is that correct? A. Yes, sir.

Mr. Hess: No further questions.

Mr. Carney: No further questions.

The Court: I wonder if you could mark on either Exhibits 15 or 16 the point at which the tug came in contact with the pier.

Mr. Carney: Your Honor, the question whether the tug or the barge, or either one.

The Court: It is the barge, I think, that came in contact. Just mark on the one, preferably No. 16.

(Witness marks on exhibit.)

The Court: Show it to Counsel.

(Exhibit presented to Counsel.)

The Court: Call your next witness.

(Witness excused.) [30]

KURT H. SICKE

a witness produced in behalf of Plaintiff James L. Winton, as Administrator of the Estate of Leonard L. Boylan, Deceased, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Fraser): State your full name, Mr. Sicke. A. Kurt H. Sicke.

Q. What business or profession are you in?

A. I am a consulting engineer and associate professor of hydraulic engineering, fluid mechanics, at the University of Portland.

Q. Would you state in general what engineering fields are covered by that title of hydraulics and fluid engineering?

A. The subject refers to the hydraulics and dynamics of fluids in quiet condition or in motion, the energy developed by fluids in motion, the pressures developed, the velocities, quantities of flow, and just about all the aspects of fluid motion and energy.

Q. How long have you been an associate professor at the University of Portland?

A. Four years.

Q. How long have you been a licensed engineer pursuant to the laws of the State of Oregon?

A. Thirty years. [31]

Q. Do you hold licenses in other states besides Oregon?

A. Yes, I am licensed in Washington and California and several of the Eastern states.

Q. The subject under inquiry, Mr. Sicke, is the

(Testimony of Kurt H. Sicke.)

Bonneville Dam. Will you state whether or not you have ever had an ocasion to work on a dam structure the size of Bonneville Dam?

A. No, sir; I haven't.

Q. Will you state whether or not you have ever had an occasion to be called as a consulting engineer or engineer in charge of dam construction in general?

A. Yes, I designed and supervised the construction of the gate structures and the power canal for the Crown-Zellerbach Company at Lebanon and the hydraulic power gate structure and canal for the Crown-Zellerbach Company at Camas, a siphon structure for the Ranier Corporation at Port Angeles, a low-level dam across the Santiam River at Lebanon, and other similar projects of that kind.

Q. Mr. Sicke, I am going to ask you to assume certain facts that are in evidence in this case: No. 1, that on the date of the accident in question, August 20, 1954, the forebay of the dam, that is, the height of water in the forebay, is approximately 73 feet; the tailrace, the height of the tailrace is 18 feet, 6 inches; the crest of the ogee is approximately 24 feet. This data is taken from a common [32] reference point. At that time the Gate No. 8 was open *to* dogs, which would be approximately 32 inches. That is the opening of the aperture of the gate which water was coming through. The gate is 50 feet wide.

From that information, are you able to express an

(Testimony of Kurt H. Sicke.)

opinion as to the velocity with which the water was coming through Gate 8? A. Yes, sir.

Mr. Frazer: Would you hand this to the witness.

(Document presented to the witness.)

Q. (By Mr. Fraser): What numbers were given to those?

The Clerk: 27 and 28.

Q. (By Mr. Fraser): Have you made a computation with respect to that information for me, Mr. Sicke? A. I have.

Q. What is your answer to that question?

A. Approximately 42 feet per second was the velocity of the water as it passed under the gate.

Q. Would you translate 42 feet per second, which amounts to the velocity that the water was moving into there, into miles per hour?

A. Very close to 30 miles per hour.

Q. Have you made a computation based on the same information for Gate No. 7 which was open approximately 55 inches?

A. The velocity is only slightly different. [33] It would be just slightly less, but for all practical purposes it would be also about 30 miles per hour or 42 feet per second.

Q. Assuming that that Gate No. 8, that the water is moving through it, I think, at a rate of approximately 5,700 cubic feet per second. In terms of weight, how much weight would be moving through that gate?

(Testimony of Kurt H. Sicke.)

A. It would be 356,000 pounds of water discharged by the gate per second.

Q. Assuming, Mr. Sicke, that Gate No. 8 is discharging water at the rate you have just testified to; that Gate No. 7 was discharging approximately 9,100 cubic feet per second; that Gate No. 6 was discharging water at approximately 5,700 cubic feet per second, and that the remaining gates were discharging water—I should say the remaining gates on the north half of Bonneville were discharging water at approximately the same rate of 5,700 cubic feet per second, with the exception of possibly Gate No. 1 and the fishway—are you able to express an opinion as to the actions of the current immediately below the spillway and immediately adjacent to the spillway?

Mr. Carney: If the Court please, I do not believe you would have sufficient data to express that opinion. Have you stated as to what each gate was spilling?

Mr. Fraser: I have attempted to paraphrase it from the basis of the records, Counsel, I think. [34]

The Court: Let the witness answer, and then if he wants to interrogate him, that is all right. Go ahead and answer the question.

The Witness: Well, in my opinion, in such a large body of water as the Columbia River and the tremendous quantities being discharged and the resulting stream turbulence below the open gates, it would be very difficult to give any definite statement

(Testimony of Kurt H. Sicke.)

as to velocities in any direction. It is a very, very turbulent flow.

Q. (By Mr. Fraser): I will ask you, are you able from the information that I have given you to diagram the principal currents that an engineer, a qualified hydraulics engineer, would expect might result; not the velocity of those currents, but the principal currents, if any? A. Yes.

Q. Can you step to the blackboard and make such a diagram?

(Thereupon a brief recess was taken.)

Mr. Fraser: For the purpose of clarification, your Honor, and Mr. Carney, I am referring now to Plaintiff's Exhibit No. 4, and the information I am asking you to predicate your opinion on, Mr. Sicke, is at Gate No. 1. That is on the extreme north side of the Bonneville Dam, and that is a fishway gate and was open eight inches; Gate No. 2 was open nine or one dog; Gate No. 3, two dogs; 4, two dogs; 5, two dogs; 6, two dogs; 7, three dogs; 8, two dogs; and on [35] all of those dogs the first dog is nine inches, the second dog is an additional 24 inches, and each dog thereafter is an additional 24 inches.

I will ask you, Mr. Sicke, on the basis of that information and the other information I have previously outlined to you, if you could diagram the primary action of the currents immediately below the spillway of the dam, assuming that all other gates on the dam that I have not referred to are

(Testimony of Kurt H. Sicke.)

closed with exception of Gate 18, which is a fish gate on the extreme south side which was open eight inches. A. Yes, sir.

Q. Would you step to the board and just hastily indicate the current actions that you would anticipate?

A. These gates are the first eight gates open to various degrees. The flow of the water under the gates is discharged at the velocity of in the range of 30 miles an hour, but that velocity is rapidly reduced for two reasons. There are a series of submerged baffles under the water across the entire face of the dam, and those baffles retard the velocity of the water being discharged, which automatically increases the depth of the water, and those two actions result in a much reduced velocity within a hundred feet of the dam. Nevertheless, velocities of flow in excess of even five miles an hour are considered to have great significance in stream data. Those velocities have a tendency to draw the [36] quiescent water, the original quiescent water, adjacent to the rapid water into the flow. The velocities at a considerable distance from the dam are now very, very much reduced, and there is a great deal of turbulence under the water which passes over the dam, is unable to pass down the bed of the stream, so there is a tendency to circulate at a slow speed. This is a tremendously big circulation because the stream is approximately a thousand feet long, nine hundred and some feet, and the di-

(Testimony of Kurt H. Sicke.)

ameter of the circulation is therefore five or six hundred feet. It is therefore somewhat hard to observe, but just from the hydraulics of discharge there is a condition favorable to such circulation, and it is almost certain to occur.

Q. In addition to the circulation as you have described it just now, is there any other type of circulation in terms of vertical circulation?

A. Definitely. Within the distance from the gate to the submerged baffles there is a rolling circulation which causes a current in the vicinity of the dam itself, a current which flows toward the spillway. In other words, there is a vertical circulation which on the surface creates a current toward the spillway.

Q. I will ask the Bailiff to hand you Exhibit No: 16.

(Exhibit referred to presented to the witness.) [37]

Can you determine from that picture, Mr. Sicke, Exhibit No. 16, any vertical circulation?

A. I would hestitate to say that one can, except as your judgment, engineering judgment, shows that it must exist by reason of the differences in elevation and the common characteristics of flow of this kind. In other words, hydraulics is a very definite science.

Q. Would you point out to the Court the difference in elevation that you are referring to in the picture?

A. Yes. There is quite a noticeable line of demar-

(Testimony of Kurt H. Sicke.)

cation between the water behind Gate 9 and the very turbulent water being discharged under the open gate. It is possible to detect the currents which show that this water surface, the turbulent water surface beyond Pier 8, is below the level of this water, the quiet water behind—I shouldn't say quiet water, but the moving water behind the closed gates.

The Court: You mean the turbulent water is below the smooth water; is lower?

The Witness: Yes, sir; there is a definite difference in elevation in this turbulent area. It would be better illustrated by the diagram that I have made here.

Mr. Fraser: You may examine. [38]

Cross Examination

Q. (By Mr. Carney): Well, then, this turbulence which you have just testified exists opposite the gates which are closed, is it correct to say that that is apparent and obvious and can be observed by a person looking at the water? A. Yes, sir.

Mr. Carney: We have no further questions.

The Court: Do you have a diagram that you prepared in your possession now showing the difference in height of the water?

The Witness: You mean this diagram which would approximate the height of the surface? Yes, sir.

The Court: Has that been marked?

Mr. Fraser: No, I did not have that marked.

(Testimony of Kurt H. Sicke.)

The Court: If there is no objection, could we have that marked?

Mr. Carney: I have not seen it, your Honor.

Mr. Fraser: I did have it marked. I had not offered it nor intended to offer it.

(Document presented to counsel for defendant.)

Mr. Carney: (Referring to document): You mean all of this?

The Witness: Just the top sheet there is the one the Judge is referring to. [39]

Mr. Carney: We have no objection that it be entered as an exhibit.

The Court: We are going to admit that.

(Document referred to immediately above marked Plaintiff's Exhibit 27 for Identification and received in evidence.)

Mr. Carney: There is another one here, No. 28. We object to this. I do not think any basis has been made for this yet.

The Court: It has not been offered?

Mr. Fraser: I have not offered it.

(Witness excused.) [40]

ROBERT C. LARSON

a witness produced in behalf of Plaintiff James L. Winton, as Administrator of the Estate of Leonard L. Boylan, Deceased, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hazard): Mr. Larson, on the date

(Testimony of Robert C. Larson.)

of August 20, 1954, is it not correct that you were doing business as Larson Construction Company?

A. That is correct.

Q. I believe that you are generally familiar with the issues in this case, and it was your company that was the employer of the individuals who were killed in that barge sinking about which we have talked here? A. Yes.

Q. Mr. Larson, can you tell us what facilities you had established at Bonneville, if any, on the date in question, August 20, 1954?

A. What facilities? We had a work yard located approximately, oh, a thousand feet below the dam adjacent to the powerhouse where we had constructed warehouses and an office and some——

Q. Was that on the Bonneville Dam site?

A. That was on what they called Bradford Island.

Q. Bradford Island as a whole, is it not a part of the [41] Bonneville site under the Corps of Engineers? A. Yes.

The Court: Were you master of the tug on this date?

The Witness: No.

The Court: That is a different Larson?

The Witness: That is right, Magner Larsen.

Mr. Hazard: That is a different man, your Honor. He was killed in the accident.

The Court: He was killed in the accident?

The Witness: Yes.

(Testimony of Robert C. Larson.)

Q. (By Mr. Hazard): Can you tell us what other facilities? Did you have a work shack there?

A. Yes, we had several work shacks and storage warehouses and an office.

Q. Were all of those located on Government premises at Bonneville? A. Yes.

Q. Approximately how many employes did you have on hand at this date?

A. I don't remember the exact number. I think there was somewhat over 100 in each shift.

Q. How many shifts were you working?

A. We were working three shifts, I believe.

Q. How did the men get to work?

A. Mostly in their own cars. [42]

Q. They came on the Bonneville premises in their own cars? A. Yes.

Q. Is it correct that some came across the spillway dam from Washington and others came through the powerhouse dam on the Oregon side when they came to work?

A. That is correct. I believe at the time there were some from Washington; I am not sure of that.

Q. Is it correct that you had—if I understand your testimony, you had about 100 men 24 hours a day; is that correct? A. I believe so.

Q. By way of employes; and all of those men were performing their work on the Bonneville premises; is that correct?

A. Well, those men who were on the premises were performing their work there. There may have

(Testimony of Robert C. Larson.)

been some other men possibly hauling equipment, something like that.

Q. But the bulk of those men were doing the work there? A. That is right.

Q. Was that the case, they would come in and around the facilities, the facilities of the Government itself, the powerhouse, spillway dam, and so forth? A. Yes.

Mr. Carney: I object to this line of questioning. I do not think it is material.

Mr. Hazard: I am not sure it is material, your Honor. [43] If the defendant wishes to stipulate that intermingling is immaterial in this case, that intermingling of employes is not required, I do not think it is.

Mr. Carney: If this is based on the question of intermingling, the only material evidence would be whether there is any intermingling of the witness' employes with Government employes at the site of the accident and not at numerous other places in the vicinity of Bonneville Dam.

The Court: Confine your interrogation to intermingling of employes in connection with the actual work that was being performed at this particular time.

Mr. Hazard: All right, your Honor.

Q. The Government liaison officer was a man named Patrick Leonti; is that correct?

A. That is correct.

Q. Did he have occasion to come to see you at

(Testimony of Robert C. Larson.)

your work shack during the week prior to August 20, 1954? A. Yes.

Q. Was that on more than one occasion?

A. I believe so.

Q. Where with respect to the spillway dam is that work shack? A. Ours?

Q. Your work shack.

A. Approximately a thousand feet downstream.

Q. It is on Bradford Island?

A. That is correct.

Q. And it overlooks the spillway dam?

A. Yes.

Q. Did you have occasion to go and visit Mr. Leonti at his quarters? A. Yes.

Q. Where were those quarters?

A. They were in the second floor of the dam tower. I don't recall the name for it.

The Court: What position did Mr. Leonti occupy?

Mr. Hazard: I believe the stipulation of facts shows, your Honor, that he was the construction engineer for the defendant, the United States, and in charge of superintending the contracts.

The Court: What was Mr. Larson?

The Witness: I was the contractor.

The Court: It is quite hard to get intermingling of the employes when you have a contractor talking to the resident engineer. That does not look like employes under the Rorvik case.

Q. (By Mr. Hazard): Mr. Larson, did any of your employes have occasion to have conferences with Mr. Leonti?

(Testimony of Robert C. Larson.)

Mr. Carney: Your Honor, I object to this line of questioning. I think the intermingling should be confined to the [45] scene of the accident and on the day that it occurred and the functions that were being performed at that time if he desires to show this for the purpose of intermingling.

The Court: I do not think he has to do it precisely on the morning of the accident, but I do not think that he can have the Administrator of Bonneville, for example, talking to the employes there and call that intermingling.

Mr. Hazard: This man is not the chief of the dam by any means. He is a liaison officer. I think the stipulation shows a construction engineer.

I would suppose, for example, take the Rorvik case where he was a ship captain. I would not suppose it makes any difference if the person has a position of authority as long as it is an employe.

The Court: I do not believe it, but I am going to listen to the testimony anyway.

Q. (By Mr. Hazard): Did your employes have occasion to have conferences with Mr. Leonti?

A. There was myself and my superintendent, Harry Clatterbos, who talked to him. To my recollection, I don't believe others had talked to him. He had just arrived at the job approximately a week or so before that. I don't recall anybody else having talked to him.

Q. Harry Clatterbos was one of your employes; is that correct? [46] A. Yes.

(Testimony of Robert C. Larson.)

Q. They had conferences at the work shack?

A. Well, I believe we three did. I don't recall that Harry and Mr. Leonti particularly had conferences other than when I was with them.

The Court: What position did Mr. Clatterbos occupy?

The Witness: He was my superintendent.

Q. (By Mr. Hazard): Mr. Larson, can you tell us how—the physical process by which the gates and spillway dam are moved, in your own knowledge, how that is down? A. Yes.

Q. Can you tell us how that is done?

A. There are two large gantry cranes, or they are also called hammerhead cranes, I believe, and those are used, those are run on tracks on top of the dam. There is a track on each side of the dam, and these run on these tracks, and they roll over at a fairly slow rate of speed, and they drop down their lines and hook onto the gate itself and lift it up.

Q. They pull it up from the top of the gate with a hook on the line. That line is attached to this gantry crane as you have described it?

A. Yes.

Q. I show you Exhibit 15 (presenting exhibit to the witness). I see in that picture what appear to be two cranes across the [47] top of the dam. Are those the cranes you are speaking of?

A. That is correct.

Q. Who operates the gantry cranes, Mr. Larson? A. The Corps of Engineers.

(Testimony of Robert C. Larson.)

Q. Their personnel? A. Their personnel.

Q. Is there a man in the cab of that; is that where he is?

A. Well, there is a man or men in the cab.

Q. Is there a man or men down on the deck of the dam? A. I don't really know that.

The Court: Are there any further questions?

Mr. Hazard: We are just conferring, your Honor.

(Discussion off the record.)

Q. (By Mr. Hazard): Mr. Larson, there are three dead men in this case, George William Graham, Leonard L. Boylan and Merle L. Tobias. They were all your employes, were they not?

A. That is correct.

Q. Start with Mr. Graham. Can you tell us, if you know, what his rate of pay was at this time?

The Court: What difference would that make?

Mr. Hazard: That would go to the issue of damages, your Honor.

The Court: I thought we had segregated the issue down to liability here.

Mr. Hazard: I had not so understood. [48]

Mr. Carney: I believe at the last time we were before the Court it was decided we would also put on evidence of damages, but as far as I am concerned that can be postponed if it helps matters.

The Court: It does not make any difference to me. I think probably the amount of damages would be substantial if the plaintiffs are entitled to recover. Proceed.

(Testimony of Robert C. Larson.)

The Witness: Mr. Graham's rate of pay was $3.25 an hour. He originally started working for me in 1953, and his rate at that time, I believe, was $3.10, but for purposes of this job it was $3.25.

The Court: What was his occupation?

The Witness: He was a carpenter foreman.

The Court: How old was he?

The Witness: Close to 50, I believe.

Q. (By Mr. Hazard): Did he receive any subsistence allowance in addition to that sum?

A. None.

Q. How long had he been in your employ?

A. He started working for me in 1953, in July.

Q. Can you tell us about Mr. Boylan, his rate of pay?

A. Mr. Boylan's rate of pay was $2.75.

Q. That is per hour?

A. Per hour. He started working for me at about the same time as Mr. Graham. He worked under Mr. Graham most of the [49] time.

Q. How about Mr. Tobias?

A. Mr. Tobias started working for me on approximately a week or ten days before the accident.

Q. What was his position?

A. He was what you might call an expediter. He also had engineering experience.

Q. A trouble-shooter or something like that?

A. Not so much a trouble-shooter as an expediter in endeavoring to help us find needed materials or scarce materials.

Q. An expediter in the sense that it is often

(Testimony of Robert C. Larson.)

used in governmental circles, somebody trying to find, locate needed materials and the like?

A. That is right.

Q. What was his rate of pay? Did you testify to that?

A. As I recall, I think his weekly earnings, I believe it was $400 a month.

Q. He was on a salary basis?

A. Yes, salary basis.

Q. What were Mr. Tobias' duties at the time this trip out on the barge was undertaken?

A. To make measurement of the ogee, which is the curve of the spillway, to determine if there was any wear.

Q. Or erosion; is that correct? [50]

A. Right.

Q. I take it he was in charge of the party; is that correct?

A. Well, yes, I would say so. There wasn't anybody actually set up as foreman in charge; but he was in charge as far as measurement was concerned.

Q. Did he receive any orders from anyone in particular of your employes?

A. Well, from myself and Mr. Clatterbos; he had come in the office, and we discussed the job with him and told him what was to be done.

Q. You told him the manner and method, how he was supposed to go out there, and the like?

A. I can't recall the retails. I am sorry.

The Court: Is it stipulated that the Government

(Testimony of Robert C. Larson.)

did not give any orders to Mr. Tobias or to anyone out on the tug?

Mr. Carney: We would so stipulate.

The Court: I mean was it so stipulated?

Mr. Carney: We will so stipulate if the other parties will. I think that is the fact.

The Court: I thought there was a stipulation of that kind?

Mr. Fraser: I believe that is covered in the stipulation, your Honor. [51]

Mr. Carney: That is correct, as a matter of fact, that there were no orders given by the Government to perform this work or how it was to be done, this particular part; is that correct?

Mr. Hazard: That is correct.

The Court: Are there any further questions? Any questions from you, Mr. Carney?

Mr. Carney: I have a number of questions.

Cross Examination

Q. (By Mr. Carney): You say Mr. Graham had worked for you previously on other jobs besides this one? A. Yes, sir.

Q. What was the nature of that work? What kind of work was it?

A. Mostly hatchery work, hatchery construction and hatchery reconstruction.

Q. Were these temporary contracts or individual contracts that he was working?

A. Well, one contract was with the State of Washington, Department of Fisheries. Another one was with the State of Oregon, the State Fish Commission.

(Testimony of Robert C. Larson.)

Q. Is it correct to say that he was regularly employed by you, or did he just work each time you got a contract? [52]

A. Well, I had continuing contracts during that year's period, but I would say that he would work for us during the contract period. He was not a regular employe as such.

Q. Were you the owner of the Tug Muleduzer?

A. Yes, sir.

Q. Were you owner of the barge, Osburn 12, that was used in this operation? Where did you get the barge?

A. From Pacific Contracting Company.

Q. Were you then operating both the tug and the barge in connection with the performance of this contract? A. Yes.

Q. Were you using it for any other purposes outside of this contract? A. No.

Q. Then would it be correct to say that this tug and barge that was involved in this accident were operated exclusively for the use of the United States in connection with the performance of this contract? A. Yes.

Q. With respect to the method by which this survey or measurement operation was to be performed, was the method and the means and the equipment and the personnel that was used selected by your company, the contractor, or did the Government have anything to do with the selection of equipment, personnel, and the means by which it was done? [53]

(Testimony of Robert C. Larson.)

A. It was done by ourselves.

Mr. Carney: We have no further questions.

The Court: That is all.

(Witness excused.)

(Testimony of Betty Graham, Lydia L. Boylan, Jessie G. Tobias and George G. Graham was taken but omitted from the transcript.)

The Court: Are there any other witnesses?

Mr. Fraser: No other witnesses, your Honor. These depositions are to be offered.

The Court: As I understand it, there is no pre-trial order any more.

Mr. Carney: That is correct, your Honor; there is no pre-trial order.

The Court: Were the facts admitted in the statement of facts in the pre-trial order on the segregated issue?

Mr. Carney: They have all been restated in this stipulation.

The Court: You have a stipulation?

Mr. Carney: Yes; which was handed up at the beginning of the trial.

Mr. Fraser: With the exception of those matters going only to the questions raised at that time, your Honor, we have [54] attempted to restate everything for this issue.

The Court: Do you want to offer some depositions?

Mr. Fraser: Well, I have forgotten what exhibit it was, but the deposition of Mr. Leonti and Mr. Goebel.

The Court: That is already admitted in evidence.

Mr. Fraser: You said to hold it back.

The Court: No, just the one.

Mr. Fraser: All right.

Mr. Carney: This one is in except for Capps.

The Court: Do the plaintiffs rest?

Mr. Fraser: Yes.

Mr. Hess: Yes.

Mr. Hendershott: Yes.

(Plaintiffs rest.)

Mr. Carney: At this time, your Honor, we would like to make a motion to dismiss the case because I do not think the plaintiffs have made out a cause of action against the Government, and they have failed to show any employe of the Government under the terms of the tort claims act who was negligent in any regard which proximately caused this accident.

The Court: I have not read the depositions. The depositions might show it, and I am not going to start reading [55] the depositions now. I am going to take the motion under advisement. Call your witnesses.

Mr. Carney: We will call Mr. Capps. [56]

ALBERT M. CAPPS

a witness produced in behalf of Defendant United States of America, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Carney): Will you state what your occupation is, Mr. Capps?

(Testimony of Albert M. Capps.)

A. I am Superintendent of Operation and Maintenance of Bonneville Dam, Bonneville Project.

Q. How long have you been so engaged? How long have you been at Bonneville Dam?

A. Nineteen years last June.

Q. How long have you been in charge of Bonneville Dam?

A. It will be two years last August.

Q. Will you describe in general what the layout of Bonneville Dam is with respect to the relationship of the powerhouse and the spillway. First, will you describe the powerhouse. Of what does the the powerhouse consist?

A. The powerhouse consists of ten main turbines and one small turbine. They are located on—built across the Bradford Slough between Bradford Island and the Oregon shore.

Q. What is the normal capacity in feet per second of flow of the river that can be taken, that is taken through the powerhouse?

A. It would be on the order of 130,000 cubic feet per second. [57]

Q. With an elevation in the forebay of the powerhouse of approximately 72½ or 73 feet and with an elevation of the tailrace at the powerhouse of approximately 18.6 feet, approximately how much water would be taken through the powerhouse to generate power?

A. I believe about 130-33,000 second-feet.

Q. With those same conditions, if the flow of the river was approximately 190,000 feet per sec-

(Testimony of Albert M. Capps.)

ond, what would have to be done—or what would be done with the excess water that would not be taken through the powerhouse?

A. Well, a small portion of it, about 3,000 second-feet, would go down the fishways, and the balance of it would have to be spilled by the spillways.

Q. If it was not spilled over the spillway dam, what would occur if all gates were closed and none of it was spilled? What would occur?

A. Well, we would flood out the upstream pool.

Q. Would you describe what is the normal elevation of the upstream pool which is referred to as the forebay; what is the normal elevation at the spillway dam at the forebay?

A. We try to maintain forebay elevation of about 73.0. It can vary up about a foot or down a couple feet, two or three feet.

Q. If any gates are on seal or closed on the spillway dam, what is the maximum elevation you can possibly have at the [58] forebay of the spillway dam? A. 74.

Q. 74 would be maximum?

A. That would be maximum; not desirable, however.

Q. Why isn't it desirable?

A. Well, there should be a little room left to handle sharp, quick changes in load on the powerhouse, if something happens, so that we can disconnect from the load. We have to take care of the water that is shut up at the powerhouse.

Q. Will you explain that in a little more detail

(Testimony of Albert M. Capps.)

as to what is meant by losing a load on the powerhouse?

A. If circuit breakers open up due to line trouble or line fault and disconnect Bonneville from the load center, it leaves the generators running without any load, and they will have to shut down, shut the water off the turbines; otherwise you have a runaway.

Q. In other words, if the load is taken off the turbines, it is necessary to have no flow through the powerhouse at all? All the water flow of the river would have to be spilled over the spillway dam or retained in the pool; is that correct?

A. That has virtually occurred.

Q. Has this ever occurred as an actual fact?

A. Oh, over the years, pretty near every year we lose a substantial part of a load sometime or other. Sometimes it [59] is only part of the plant load, maybe seven out of ten units. Sometimes we only lose the load out of, four out of ten units. Once or twice, I believe, in the past we have lost the load on all ten units.

Q. Is there any other reason to have a margin of safety in the forebay elevation?

A. Well, something may arise where it would be rather urgent that you be able to close the dam for a short period of time.

Q. By closing the dam, which part of the dam do you mean?

A. The spillway dam, to close the spillway for

(Testimony of Albert M. Capps.)

a short period of time, and so we try to maintain a little room.

Q. I would like to have you handed Exhibit No. 4.

(Exhibit referred to presented to the witness.)

Will you state what is Government's Exhibit No. 4?

A. This is a log of the spillway gate openings by bays. It refers to what we call dogs, which means that when a gate is raised there is a latch dropped down and the gate set down on that latch, and if you raise it two dogs it would go up to the second notch on the gate and be latched at that point, and it illustrates the dam changes, what bays and what gates were changed and how much.

The Court: What is the purpose of this testimony?

Mr. Carney: The purpose of this testimony is getting at the point of showing whether it was necessary to expel [60] water at the time of this accident and whether possibly to close down all gates for a very short time because of the flow of the river and the part that was to be taken through the powerhouse and the part that would have to be expelled. That is the purpose. I would like to have the witness also handed Government's Exhibit 17.

(Exhibit referred to presented to the witness.)

Q. From Government's Exhibit 17, what was the flow of the river on August 20, 1954?

(Testimony of Albert M. Capps.)

A. 191,100 cubic feet per second.

Q. What part of that was taken through the powerhouse?

A. 115,000 cubic feet per second.

Q. What happened to the rest of it?

A. 800 cubic feet per second was ponded.

Q. What does that mean?

A. It was left in the forebay, held over.

Q. In other words, there was part that was not being spilled?

A. It raised the elevation slightly.

Q. What happened then to the rest?

A. 52,300 cubic feet per second were discharged through the spillway dam. 3,000 cubic feet per second were passed over the fishways.

Q. Immediately after this accident occurred I understand that all of the gates at the spillway dam were closed. Would [61] you refer to Exhibit No. 4. A. Yes, sir.

Q. Referring to Exhibit No. 4, can you state whether or not all the gates were closed, as a matter of fact?

A. All of them but those two gates on the end that were open eight inches only.

Q. How long did it take to close all of the remaining gates, which were Gates 2 through 8, after the accident occurring at 2:00 o'clock? What time were all of the gates down?

A. The last gate was closed at 3:45 p.m.

Q. Would you explain why it takes an hour and forty-five minutes to close all those gates?

(Testimony of Albert M. Capps.)

A. The gates are quite heavy. They weigh 240 to 250, up to 290 tons each. There are 350-ton cranes that handle them, and, consequently, the cranes are big and cumbersome and very slow.

Q. How was this time in connection with as fast as they are usually closed; do you know? Was this fast or slow?

A. It was as fast as could possibly be done that day.

Q. When were any of the gates again reopened after they were all closed at 3:45?

A. At 4:45 the first gate was opened.

Q. How many dogs? A. Four dogs. [62]

Q. When was the next one opened?

A. 5:00 p.m.; two more dogs.

Q. What was the next?

A. Bay 2; 5:15 p.m., two dogs; 5:30, two dogs.

Q. Would you explain why it was necessary to immediately reopen these gates?

A. Well, we were rapidly filling up that little storage room that was available in the forebay, and it is extremely undesirable and unsafe to take the water over the top of the gates. We had to spill the water under the gates.

Q. About on August 12th or 13th, 1954, did you have a conversation with Mr. Larson?

The Court: August what?

Mr. Carney: August 13, 1954, which would be approximately a week before the accident.

The Witness: I did.

(Testimony of Albert M. Capps.)

Q. (By Mr. Carney): What was the conversation about?

A. Let's see, August 13th, I believe that is the day that we looked over the stilling basin at the spillway.

Q. If that is the case, I want to go back perhaps to the day before. Did you have a conversation with Mr. Larson with respect to closing some of the gates or all of them at the spillway dam?

A. That is right; I think that occurred about August 12th when Mr. Larson asked me if we could close off the south half [63] of the dam and let him see how turbulent the water was and how—whether or not he could work in there.

Q. What did you tell him at that time?

A. I told him that we could, I would check and survey the situation, and probably we could close the south half of the dam for observation.

Q. Was the spillway dam closed then on about August 13th? A. It was August 13th.

Q. By the south half we mean Gates 11 through 17; is that correct? A. That is right.

Q. Then after the Gates 11 through 17 were closed, did you thereafter have a conversation with Mr. Larson at the scene of the spillway dam?

A. Yes.

Q. What was the conversation?

A. Well, Mr. Larson and I looked over the tailrace, and he wanted to know what I thought about how safe it would be to work or if you could work there, and I told him that with that much turbu-

(Testimony of Albert M. Capps.)

lence I didn't see how he could work in there, and he asked me what I thought about bringing the derrick barge in there. I told him I thought if they brought a derrick barge in and kept close to the south shore and moored it at the south retaining wall that it could be done all right. [64]

Q. Thereafter was a derrick barge actually brought in and moored at the training wall on the south side of the dam?

A. It was. I believe it came in on the 19th.

Q. For clarity here, the derrick barge is not the barge that is involved in this accident; is that right? A. That is right.

Q. Did you have any conversation with Mr. Larson at that time with respect to making the measurement for the survey which was the subject of this accident? A. No.

Q. Was there any conversation as to where the construction was actually going to commence with relation to the dam?

A. I can't recall particularly. I believe it was pointed out to me, possibly by Mr. Larson or someone or maybe when we were just talking at the time there, that the work would start at—near this retaining wall at the south end of the spillway.

Q. Opposite which gate would that be?

A. Well, that would be opposite Gate 17.

Q. Would you explain as to whether it would have been possible to draft the forebay of the spillway dam; that is, to overspill for a period and then to thereafter be able to have the gates closed for a

(Testimony of Albert M. Capps.)

period? What is involved in an operation of that kind?

A. To do that you would have to overspill at night or one [65] period and close off the water another period. You would have to overspill to get the pool down low enough so that when the time you have the gates closed you won't overflow or flood the forebay. It is possible to——

Q. Was that considered in connection with this general construction job, not the particular operation of going out and surveying this bay, but generally in connection with this construction project?

A. It was considered when we first closed the south half of the dam. It was considered.

Q. What plan of action was agreed upon or planned?

A. Well, it was decided to overspill at night, which would virtually double the spill for a period of hours, would be more detrimental with his derrick barge in the tail bay than it would be to discharge the normal flow and hold it continuously.

Q. Why would it be more detrimental to the situation in the tailrace?

The Court: The situation in the tailrace?

Mr. Carney: The tailrace is the area immediately downstream from the spillway dam. It is the area where this accident occurred, and I want to know why this excessive spilling at night would be more detrimental in that area than the plan of action of spilling through Gates 2 to 9 during the entire 24 hours. [66]

(Testimony of Albert M. Capps.)

The Witness: To give them eight hours' working time, it would require probably just about double, maybe a little more than double the normal spill through the open gates, and that would increase the turbulence in the eddy maybe not exactly in proportion to flow but substantially in that direction, and with his derrick barge tied up along the shore if he was working in there, it would be still more equipment in there, and it seemed the most desirable condition to keep the discharge at a minimum, which would mean we would have to discharge 24 hours continuously.

Q. What effect would spilling in advance in order to close off all of the gates for even a short time have upon the power output at the powerhouse?

A. At this particular head, it would be detrimental. Part of the dam would be down to a lower head. We would lose—we would have to draft the forebay two or three feet, and it is worth about eight—about 16,000 kilowatt-hours per foot, which we would lose, and then at that time the demand for power was well up to the point where it would require all available capacity at Bonneville, and would lose generation if we fluctuated the pool.

Q. Would any planning or anything have to be done with any other agencies besides the operators of the dam if this were to occur because of loss of power?

A. We would have to make arrangements with the marketing [67] agency, Bonneville Power Administration, and possibly they may have to make

(Testimony of Albert M. Capps.)

some arrangements to get steam power or possibly drop some load or get someone else to carry the load for us. I don't know what arrangements they could make at the time, but they have to explore that and work out the most economic replacement.

Q. At any time did either the contractor or anyone else ask that all of the gates in the spillway dam be closed?

A. I don't believe it was ever asked if we could close them all.

Mr. Fraser: You are referring to prior to the accident, Counsel?

Mr. Carney: At any time prior to the accident on August 20th.

The Witness: No.

Mr. Carney: You may cross examine.

Cross Examination

Q. (By Mr. Fraser): Mr. Capps, you spoke of ponding of water. I think you said you were ponding at the rate of 800 cubic feet per second?

A. That is right.

Q. Was that on the day the accident occurred?

A. That is a 24-hour average on the day the accident occurred. [68]

Q. Can you tell me how long it takes ponding, we will say, let's take a round figure, 1,000 cubic feet per second? How long does that take to raise the forebay one foot?

A. Well, 1,000 second-feet would not raise it very much. Let's see, 1,000 second-feet, to raise one foot that would be only about a tenth a day.

(Testimony of Albert M. Capps.)

The Court: I did not hear.

The Witness: It would raise it about—1,000 second-feet would raise it about one-tenth of a foot per day.

Q. (By Mr. Fraser): Let's take a figure like 6,000 cubic feet per second. How long would it take it to raise half a foot?

The Court: The testimony is that they were letting over 50,000 cubic feet go through the gates when they were ponding 800.

Mr. Frazer: That is precisely it, your Honor; they were letting 5,700 cubic feet per second come through on Gate 8, they were ponding at the rate of 800, and so the total is 6,500.

Mr. Carney: It was not coming into Gate 8.

Mr. Fraser: 5,700 was coming into Gate 8, and my point in this line of testimony is solely for the purpose of pointing out that Gate 8 could have been shut down for a minimum of six hours without going over the normal limit of 74 in the [69] forebay.

The Court: Suppose that they had closed Gate 8. What would have happened, Mr. Capps?

The Witness: Let's see, 57,000 per second-feet——

Mr. Fraser: 5,700, Mr. Capps.

The Witness: 5,700, excuse me. That would be —it would take about five hours to fill up one-tenth.

The Court: One-tenth?

The Witness: Tenth of a foot.

(Testimony of Albert M. Capps.)

Q. (By Mr. Fraser): The reading that day was 73 plus?

A. 73.5 at that time of the day. Just a minute; maybe I got it here (consulting document)—73.0.

Mr. Fraser: I am reading here now from—has this been introduced in evidence? (Referring to document.) I ask the Clerk to hand this to the witness. If it has been introduced, it has not been marked, so I will ask that it be marked.

Mr. Carney: It should be marked as 26, I believe. It should be 26.

(Document above referred to marked Plaintiff's Exhibit 26 and handed to the witness.)

Q. (By Mr. Fraser): Mr. Capps, referring to the first paragraph in that exhibit, I think there is a definition of a normal river flow there, 260,000, up to 260,000 cubic feet per second? [70]

A. That is right.

Q. And that the average height of the forebay would vary between—is it 72 and 74?

A. 70 and 74.

Q. 70 and 74, so that the figures that we are dealing with on August 20th were within normal limits, were they not?

A. Considered normal. This stream flow, however, is normal compared to flood.

Q. Yes, but actually on August 20th you were only handling 191,000? A. That is right.

Q. Considerably less than the maximum 260 in your description of normal stream flow.

Going back now to the conversation that you had

(Testimony of Albert M. Capps.)

with Mr. Larson with regard to, is it the Barge Columbia?

A. I believe that was the name of it.

Mr. Carney: Derrick barge.

Mr. Fraser: Derrick Columbia. Do you remember what day that was that you looked at this? Was it the tailrace that you looked at?

A. At the spillway. I believe that was, that was the evening after—of the day that we had closed the south half of the dam.

Q. Was that the day that you decided that he could tie along there safely? [71]

A. That is right.

The Court: With the derrick barge?

The Witness: He could tie the derrick barge to the south training wall. If he stayed in close, he could bring the derrick barge up there and tie it to the south training wall.

Q. (By Mr. Fraser): What was that again, the south what? A. Training wall.

Q. Adjacent to the south training wall?

A. Bay 18 on the right, Bay 17 upstream in front of it.

Q. Bay 17 was closed at that time, wasn't it?

A. That is right.

Q. And Gate 18 was what?

A. Gate 18 was open 8 inches.

Q. And was discharging how much water per second?

A. Oh, we figured about 500 second-feet, something like that.

(Testimony of Albert M. Capps.)

Q. Which is considered in this case the discharge at Gate 8 on August 20th?

A. Yes, that is right.

The Court: Why couldn't you have closed Gate 8 altogether?

The Witness: Well, we could, but it was the water—it made the water for the fishway entrance, and we had that [72] open to give a velocity exit at the fishway entrance for——

Mr. Carney: I think you misunderstood 18 for 8. He asked you why Gate 8.

The Witness: Oh, Gate 8.

The Court: The bay.

The Witness: Bay 8?

The Court: Bay 8, what gate was at Bay 8?

The Witness: Gate 8 or Bay 8?

The Court: Which ones had already been closed?

The Witness: We closed——

The Court: 9 to 17?

The Witness: We closed, let's see, first we started out with 11 to 17.

Mr. Fraser: You can refer to your record there which shows exactly.

The Court: 11 to 17?

The Witness: That was first.

The Court: Then what else did you close?

The Witness: Well, then, on that particular day of the accident they asked us to close 9 and 10, Bay 9 and Bay 10, which was done.

Q. (By Mr. Fraser): State what time the closures were effected. A. 12:30 p.m.

(Testimony of Albert M. Capps.)

Q. Both gates or just—— [73]

A. Both gates.

Q. Then when was the next closure?

A. The next closure, it was after the accident at 2:30 p.m.; Bay 8.

Q. What gate was closed then? A. Bay 8.

Q. How long was it before another gate was closed after Bay 8 was closed?

A. Oh, it was about a half-hour before we got Bay 3 closed, and Bay 3 and Bay 7 were closed simultaneously.

Q. Let me ask you this question, Mr. Capps: If you had received a request to close Gates 10, 9 and 8, could you have closed those gates?

A. Yes, I think we could have closed another one. We closed the two they asked for without any hesitancy. If you had got into any more, we would have probably made inquiries as to how long they wanted them closed to see where—if we could accommodate them.

Q. Mr. Capps, as I understand it, you are operations officer at the dam, and with respect to gate closures on this particular project you discussed or received communications from Leonti, the resident engineer; is that correct?

A. If Leonti wanted gates closed, he would tell us to close them or ask us to close them. If there was no problems involved, offhand they would just go ahead and close them. [74] Otherwise we regulated the gates without any communications from

(Testimony of Albert M. Capps.)

Leonti or anyone else if the stream flow changed or we had to spill some more water out there.

Q. Assume that you are confronted with a situation where closures would be requested by Mr. Larson or Mr. Leonti, and, in your opinion, it might affect the production of power. Would you then call a conference concerning that closure that had been requested?

A. If it was critical or difficult to obtain, we would call a conference.

Mr. Fraser: I have no further questions, your Honor.

Redirect Examination

Q. (By Mr. Carney): Actually, at the time of the accident at 2:00 o'clock on August 20, 1954, how much water was being spilled in terms of feet per second through the spillway dam?

A. Well, let's see. (Witness consults exhibit.)

Q. I wonder if he could see the calculation.

Mr. Fraser: I think he has already testified to those figures.

The Witness: 45,550 cubic feet per second.

Q. (By Mr. Carney): At that time I believe you have previously testified that there was approximately 133,000 being spilled through the powerhouse? [75]

A. That is right.

Q. And that the flow was 191,000 feet. What was happening to the rest of the water? In other words, if you had the forty-five to the one hundred thirty-one, it comes out to be about 178,000.

(Testimony of Albert M. Capps.)

The Court: He has already testified that some of it went into the fish gate and the balance was being ponded.

Q. (By Mr. Carney): Will you state if an additional gate was closed, for example, Gate 8, what effect would that have had on the turbulence in the spilling basin, the tailrace, with all of the water then spilling out of just Gate 2 to 7?

A. If 2 to 7 were open to compensate for the closure of 8, it would increase the turbulence on the south half of the dam.

Q. Why is that? A. Well,——

Q. Would you like to use the blackboard?

The Court: I think that is quite obvious, but that was not the original question. Suppose that they had closed Gate 8 without compensating for it from Gates 1 to 7; inclusive. What would that have done besides raising the water?

A. It probably would not have affected the turbulence in the tail water one way or the other. It might have decreased it a little bit. [76]

The Court: It might have decreased it around No. 8?

The Witness: It might have decreased it around Gate 8, but it may have increased the eddy a little bit because you are creating an eddy of larger diameter if you move your gate spillage over to the north shore.

The Court: In your view, then, it might have cut down the turbulence immediately adjacent to Gate No. 8?

(Testimony of Albert M. Capps.)

The Witness: It would reduce the turbulence at Gate No. 8.

The Court: Would it increase the flow of water in Gates No. 1 to 7 by the closure of Gate No. 8?

The Witness: No, sir.

Mr. Carney: I have no further questions.

Mr. Fraser: No questions.

Mr. Hess: No further questions.

The Court: Did you discuss with Mr. Larson any time after the 13th the desirability of closing Gates 1 to 8 during the time that he intended to work?

The Witness: I can't remember whether that is a fact or not. I know that was our understanding from some conference which we had. I can't remember whether it was with Mr. Larson or who it was with. I know the question sometime must have been asked if we could close the dam off entirely.

The Court: Were you asked about the feasibility of this mission that they were undertaking?

The Witness: No, sir. [77]

The Court: Did you give them any information about its feasibility?

The Witness: No, sir.

The Court: Did you know that they were going to do it on the afternoon of August 20th?

The Witness: No, sir.

The Court: Were there alternative methods by which they could have accomplished the same purpose?

The Witness: I do not feel that I am qualified

(Testimony of Albert M. Capps.)

to answer that question. I am not a construction man."

The Court: Neither Mr. Larson nor anyone else discussed with you the feasibility of the plan nor the intention of the company to conduct the operations that were conducted on the 20th of August?

The Witness: No, sir.

The Court: As far as you know, Mr. Leonti was not consulted either?

The Witness: Well, I couldn't say about that.

The Court: Is he here, Mr. Leonti?

Mr. Carney: His deposition is here, and I believe his deposition will show that he was told that they were going to go out here, and he was the one —I think the stipulation further shows that the contractor's employe asked Mr. Leonti to close two additional gates, which were closed. [78]

The Court: Any further questions?

Mr. Fraser: No further questions.

The Court: That is all.

Mr. Carney: That is all of the testimony.

The Court: Where are the depositions?

Mr. Carney: The depostions are here. I would say that the depositions of Mr. Leonti and Mr. Goebel are in evidence, but the deposition of Mr. Capps which happens to be in the same book is just here for impeachment purposes.

(Thereupon, after discussion between Court and counsel, the hearing was concluded.) [79]

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

DEFENDANT'S EXHIBIT No. 8

DEPOSITION OF PATRICK J. LEONTI

Patrick J. Leonti, a witness produced in behalf of Plaintiffs, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hazard): Mr. Leonti, at the end of the deposition you have the privilege of awaiting its transcription and reading it before signing it, or you can waive your signature, and waive the reading of the deposition. It is customary to waive it, but it is your privilege to await its transcription. I will ask you now whether you wish to waive it or not. A. I desire to waive it.

Q. Would you state your name, please?

A. Patrick J. Leonti.

Q. What is your age, Mr. Leonti? A. 43.

Q. What is your occupation?

A. Construction engineer for the Corps of Engineers.

Q. To what District of the Corps of Engineers, if any, are you particularly assigned?

A. Portland, Oregon, District.

Q. How long have you been in the employ of the United States? A. Oh, about 18 years.

Q. How long have you been employed in this District?

A. From the middle of 1949. That makes it roughly six and a half years. [4]

(Deposition of Patrick J. Leonti.)

Q. What is the nature of your duties that you customarily perform for the United States?

A. Well, at present and at the time that we are concerned with, why, my job was to work on construction contracts to see that the interest of the Government was lived up to.

Q. What was your title at the time on the Larson contract?

A. I was the Construction Project Engineer at Bonneville.

Q. Your official title was Project Engineer, is that correct?

A. Yes, Project Engineer. It was (Construction) in that there is Construction and Operations Project Engineer, too.

Q. Is this similar in nature to the task that you perform? A. Pardon?

Q. Is this the same sort of thing you have done for the Government elsewhere in this District?

A. Yes.

Q. Before and after?

A. What I am doing now, too.

Q. What kind of projects had you customarily worked on? A. On dam construction.

Q. How long have you been in dam construction?

A. Well, I have worked for the Corps of Engineers totally for the 18 years and essentially there in dam construction.

Q. During that time virtually all of your work has been in dam construction? [5] A. Yes.

(Deposition of Patrick J. Leonti.)

Q. Can you describe the general nature of the project? Are you aware that there was a contract between Robert Larson, doing business as Larson Construction Company, and the United States?

A. Yes, I was.

Q. Could you state the general nature—wasn't that contract relative to the repair of Bonneville Dam?

A. Yes, it was the repair of the baffle deck and restoration of the baffles, I think, is the full detail of that particular contract.

Q. When was that contract entered into?

A. Oh, you want the official——

Q. Roughly. A. Awarding date?

Q. Roughly.

A. Well, I think in June or July of 1954.

Q. What was the general nature of the intended project? A. I do not——

Q. Can you describe what was supposed to be done by the contractor in carrying out the contract?

A. He was to erect and construct the cofferdam and seal off, let us say, a portion of the baffle deck at Bonneville and then dewater the area and then repair the baffle deck and the baffles. [6]

Q. Can you describe first what is meant by the baffle deck?

A. Well, just immediately downstream of the spillway of the dam—I guess everybody is familiar with a dam spillway—there is an area with these concrete, oh, let us call them the obstructions, deliberate obstructions that we put in to cut down

(Deposition of Patrick J. Leonti.)

the velocity of the flow of the water over the spillway, and our job was to repair the deck that those baffles were on and the baffles themselves.

Q. Is this sort of like an apron below, a concrete apron extending below the dam?

A. Immediately below the spillway is the baffle deck, and then immediately below the baffle deck is the so-called apron.

Q. What was the occasion for undertaking to repair it? Did you have knowledge of defects or breaks in the baffle deck?

A. Just based on previous studies made by the Corps of Engineers.

Q. What did those studies reveal? What was the problem?

A. Well, that the flow of the water over Bonneville Dam through the years had eroded the concrete on the baffle deck and the baffles themselves.

Q. Was there a pitting or something of that sort?

A. Yes, pitting, eroding, breaking them up; therefore, they were not working at their fullest efficiency. [7]

Q. How much of the dam was to be repaired in this project?

A. In this particular contract, you mean?

Q. Yes, sir.

A. For the south half of the spillway.

Q. That would be the Oregon side?

A. The Oregon side.

(Deposition of Patrick J. Leonti.)

Q. I will hand you Plaintiffs' Exhibit No. 1 which I will ask the Reporter to mark.

(Blueprint of site map marked Plaintiffs' Deposition Exhibit No. 1 for identification.)

Q. (By Mr. Hazard): I am handing you Plaintiffs' Exhibit No. 1 which is a blueprint map entitled "Sheet 1 to 12," and it is coded M-2-61/1. Am I correctly designating the technical number of this map? A. Yes.

Q. This appears to be a small scale map of the Bonneville Dam, the powerhouse and spillway dam, and it has certain marks on it to indicate a project to be conducted on the Oregon side of the spillway dam; is that correct? A. Yes, it is.

Q. And first, in reference to this on the Oregon side of the spillway dam on the downstream side, according to the map are indicated a series of circles parallel to the dam. Could you tell us what those are? [8]

A. Those are steel sheet piling, cellular cofferdam; well, the entire thing makes a cofferdam. These are individual cells connected together forming the cofferdam which, in turn, seals off this particular area in which the work is to be conducted.

Q. I see seven large circles going parallel to the dam and three small circles coming in an arc more or less vertically—or at right angles to the face of the dam. Each of those is a cylindrical section of the cofferdam; is that correct?

A. That is right. They are individual cells forming the entire cofferdam.

(Deposition of Patrick J. Leonti.)

Q. Is there some sort of a seal between each of the cells; is that correct?

A. There is what we call the connector, this little arc on one side, arc on the other side made up of the same material, steel sheet piling, connecting the individual cells together and forming, as I say, the entire cofferdam.

Q. When you mention those little arcs you are talking about those small, some 15-degree arcs between the circles; is that correct?

A. That is right; those are the connectors.

Q. At the northern or Washington end of the cofferdam I see a grid which on the map is rectangular as viewed from above. Could you tell us what that is?

A. That is—we call it the timber crib which effected the [9] closure for the cofferdam on that north side, as you say. The steel sheeting piling cellular cofferdam was connected or joined to the timber crib, and that effected the seal for the particular area in which your work was to be done.

Q. Do I understand that the crib was to butt against the face of the dam; is that correct?

A. That is right, and rest on the so-called ogee curve of the spillway section of the dam itself.

Q. Could you explain for us what you mean by ogee curve?

A. Well, I designate it with my hand, but it is the one cross-section area of the spillway itself. I mean this thing is not rectangular or square. I guess you people have seen dams. The spillway sec-

(Deposition of Patrick J. Leonti.)

tion of the dam itself is formed in a curve to make the least resistance for the passage of water over the spillway.

Q. Does ogee refer to the cross-sectional——

A. No, it is the type of curve. It is named for the type of curve.

Q. The ogee describes the kind of cross-section we have here; is that correct?

A. That is right.

Q. Below or downstream from a cross-hatched area is a small cylindrical section of the cofferdam. Is it correct that at that point your cofferdam commences and that those rest on a more or less flat section of the spillway? [10]

A. The individual cells of the cofferdam, these two here that are indicated.

Q. You are referring to the two small ones that —one which comes immediately off the timber cribbing and the second one is the one next following that going downstream?

A. Yes, designated in the design, let us say, of the cofferdam, cells No. 1 and 2.

Q. Could you mark those on the map, please? Would you mark a little "1" next to the cell you are talking of as 1 and 2. Are they numbered consecutively thereafter; is that correct?

A. Yes.

Q. Could you just number three so that we can see.

(Witness writes on exhibit.)

(Deposition of Patrick J. Leonti.)

Q. And thereafter they run right down; is that right? A. 4, 5, 6, 7, 8, 9 and 10.

Q. Now you were speaking of Cells No. 1 and 2, how they rest on the—what sort of a foundation did they rest on?

A. They rested on the concrete baffle deck, this area designated by this dotted lined downstream.

Q. The first dotted line down from the dam?

A. Down from the dam and into the ogee of the spillway is the location of the baffle deck, and Cells 1 and 2, except for the small downstream portion of Cell No. 2, rested on the baffle deck itself.

Q. Cell No. 3 rested on the apron; is that correct? [11]

A. On the apron, and so did all the other cells.

Q. So that the apron is the area between the first dotted line downstream from the dam and the second dotted line downstream from the dam; is that correct? A. Yes.

Q. Is it correct that at the point where Cell No. 1 is located the ogee is fairly flattened, relatively flattened?

A. Well, approximately at the upstream end of Cell No. 1, let us say, the ogee curve starts.

Q. Upward toward the dam?

A. Upward toward the upper end of the ogee end of the spillway.

Q. So that Cells No. 1 and 2 and 3 rest on comparatively flat surfaces; is that correct?

A. And so do Cells 4 through 10; all the cells do.

Q. Yes, as distinguished from the timber crib?

(Deposition of Patrick J. Leonti.)

A. That is correct.

Q. Could you explain the purpose of having separate—having cells and crib? For example, why didn't they have cells go all the way up to the face of the dam?

A. Oh, that is not technically nor economically feasible, to run the cellular cofferdam up on a steep grade.

Q. It would be structually difficult to work it out?

A. That is right, in that we are dealing with concrete foundation, let us say, and not being able to obtain any [12] penetration; that is, driving them into some softer material.

Q. That is, they simply rest on the surface; is that it?

A. That is right. Why, you would not be able to set steel piling, as I say, on a relatively steep——

Q. It would skid or something of that sort?

A. That is right.

Q. Can you describe the manner of construction of the timber crib? What is that like? Can you describe its appearance and what it does?

A. Well, it was built of good-sized timbers, let us say, and more or less in latticework, if you know what I mean. It was built log-cabin style.

Q. That is, you are moving from the bottom to the top, building in log-cabin style?

A. Either way, either longitudinally or laterally as you built in that fashion, and, then, as I say, the intent was to set that on the curved portion of

(Deposition of Patrick J. Leonti.)

the spillway, and then it was sheathed on the inside with vertical sheathing and then filled with sand and gravel.

Q. The bottom of the crib, what was the shape of that?

A. That more or less was to conform to the cross-sectional—cross-section of the spillway itself.

Q. So that the curve of the bottom of the timber crib should have an ogee in the same way that the dam face itself is an ogee? [13]

A. Yes, to a certain extent. I mean, it would be hard to build a latticework timber crib to conform exactly to the ogee curve of the spillway.

Q. But within the limitations presented by the fact that you were using square timbers at the bottom, that was the purpose, and were they cut off at different lengths so that you would have a curve there?

A. That is right; they were cut off at different lengths, and they were, oh, mitered or beveled to effect a more perfect fit to the spillway.

Q. Is the crib at the point where it touches the dam, is its edge vertical or is it—is it a continuous curve from the upstream top of the crib to the downstream bottom, or it the curve only along the bottom side of the crib, if you follow me?

A. No, not quite. The entire bottom side of the crib is resting on this, as I say, so-called spillway, bucket.

Q. I will hand you Plaintiffs' Exhibit No. 2 which I will ask the Reporter to mark.

(Deposition of Patrick J. Leonti.)

(Blueprint map of timber crib and details, M-2-61/3, marked Plaintiffs' Deposition Exhibit No. 2 for Identification.)

Mr. Hazard: This appears to be a blueprint map numbered Sheet 3 of 12, M-2-61/3. This appears to be the detail of the crib section. How would you describe this part of the map, Mr. Leonti? [14]

A. It is a longitudinal section through the crib. When I say "longitudinal," longitudinal the way we are facing, upstream to downstream or vice versa.

Q. Is this drawing substantially the shape in which the crib was to be placed?

A. That is correct.

Q. According to this diagram, there was really no upstream vertical edge of the crib. It was one continuous curve?

A. Just a small—you are speaking of the bottom?

Q. Yes, except for that small, I guess, blocking at the end: is that correct?

A. Well, if we designate the distance from here, from this extreme downstream point to this extreme upstream point, this as the bottom, and then we can discuss from there what you are talking about. You mentioned vertical, and I am thinking of this little particular vertical portion running up here (indicating on exhibit).

Q. That appears to be just a few feet long; is that correct? A. That is correct.

Q. Now, I see on the extreme right of the draw-

(Deposition of Patrick J. Leonti.)

ing "Spillway Crest Elevation 24.0." What does that mean with respect to the dam?

A. That is the elevation of the topmost point on the spillway, and that figure 24 designates its elevation above a certain [15] datum which I think is taken usually around here as meaning was level.

Q. At that point the ogee of the spillway crosses the line marked "Axis of Dam"? A. Yes.

Q. Is that point the point at which the gate hits the foundation of the dam?

A. I don't believe so. I think it would be well to wait for other witnesses who know more about the exact location of the gates with respect to the axis of the dam.

Q. You do not have any knowledge, looking at this diagram, where the timber crib, where the bottom of the gate orifices is located?

A. Not in detail. It would be just a guess on my part to say that they are located upstream or downstream of that dam axis.

Q. Mr. Leonti, do you know when notice was given to—or approximately when notice was given to Larson to commence construction of the project?

Mr. Carney: Are you asking if he knows of his own knowledge?

Mr. Hazard: Yes.

Mr. Carney: Do you know of your own knowledge?

The Witness: No, not at the present moment; I will say I do not. [16]

Q. (By Mr. Hazard): Do you know when he,

(Deposition of Patrick J. Leonti.)

in fact, first came out with his preliminary crews to the dam?

A. Not the exact date. It would be a bare guess on my part now as to when he exactly came out.

Q. Do you know when you came out?

A. Yes, I started at the project itself on the 16th of August, 1954.

Q. Was Larson already there? A. Yes.

Q. Who did he have with him at that time?

A. Whom did he have with him?

Q. Yes, did he have a full crew, or did he have merely preliminary crews?

A. No, at the time I came, why, his crew was fairly substantial in that he was, let us say, doing preliminary work in conditioning of the piling in an area that we designated as the welding yard.

Q. That was on dry land? A. Yes.

Q. He was preparing some of the materials for future use in the building of cells?

A. That is right.

Q. Do you recall what day of the week the 16th was? A. Yes, it was Monday.

Q. Monday? A. Yes. [17]

Q. Did you have a discussion with him at that time about the order of procedure in building his cofferdam?

A. No. You mean when I first arrived on the job?

Q. Yes.

A. No, I arrived on the job and then let my presence be known and met Mr. Larson at the time and his key men.

(Deposition of Patrick J. Leonti.)

Q. Who were they?

A. Mr. Harry Claterbos, Jr., was his, I guess we would call it, acting superintendent at that time.

Q. Were there any other key men?

A. Let's see; there was a pile buck foreman or superintendent. I forget his correct designation, a Mr. Davenport, and I met Mr. Larson's timekeeper and some of the, well, some of the other pile buck foremen. I was going to say I would guess that Mr. Davenport was their pile buck superintendent and that he had other foremen working under him, and I met several of those.

Q. What was the nature of your discussions?

A. Well, you mean on the specific day or in general?

Q. Well, you arrived on the project on Monday. Let us back up for a minute. Are you aware that the occurrence which is involved in this litigation happened on the 20th of August?

A. That is correct.

Q. Is that a matter of your own knowledge?

A. Yes. [18]

Q. Do you recall what day of the week that was? A. That was a Friday.

Q. What sort of discussions did you have with Mr. Larson between Monday and Friday about the conduct of the work?

Mr. Carney: I will object to the form of the question. I think it should be more specific. You are asking the witness to state what he did over a whole week.

(Deposition of Patrick J. Leonti.)

Q. (By Mr. Hazard): Did you have any discussions during that week with respect to the order in which Mr. Larson would conduct his activities?

A. Oh, I probably did. I mean we had numerous discussions in the course of the week, naturally, on the different phases of the work and spoke of the conditions of the specifications that were going to have to be lived up to and the completion time on the various phases of the work.

Q. Did you discuss with him the building of the timber crib?

A. I don't know whether we did at that particular time. Subsequent to that, of course, we had any number of discussions on the fabrication of the timber crib.

Q. Did he discuss with you the procedure by which he measured the ogee of the stream?

A. Mr. Claterbos was the one that I had a prior discussion with.

Q. What was the nature of that discussion?

A. Well, on the—now, this was in the middle of the week [19] on Wednesday. That would be the 18th of August, and he requested a closure of certain of the spillway gates so that he could go in with a barge towed with a tugboat that they had at the time to attempt to determine the conditions of the spillway at the particular bay that the timber crib was to set in, and that was to occasion the closure of additional spillway gates, particularly in the area that the timber crib was to set.

Q. Do you have any recollection of approxi-

(Deposition of Patrick J. Leonti.)

nately the number of gates that were opened before he made the request?

A. I believe that the number that were closed before he made the request were seven gates that had been closed.

Q. Seven were closed at the time?

A. That is right.

Q. How many gates are there, Mr. Leonti?

A. There were 18 gates all told in Bonneville.

Q. Does that include the fishway gates?

A. Yes, I believe it does.

Q. Let me back up a minute. Do I understand that the fishway gates are at the extreme ends of the dam, one on the Oregon side and one on the Washington side? A. That is correct; yes.

Q. And in between there are, then, 16 gates?

A. I do believe that is the correct number.

Q. According to your best recollection?

A. Yes. [20]

Q. Are those gates numbered?

A. Yes, they are numbered.

Q. How are they numbered?

A. Starting No. 1 on the Washington shore and then proceeding in a southerly direction to the Oregon side.

Q. Is the fishway gate on the Washington side No. 1?

A. I think it is. I do believe we could check the plans or—again let me say that there are other witnesses that are more familiar with the number of the——

(Deposition of Patrick J. Leonti.)

Mr. Hazard: Off the record.

(Discussion off the record.)

Mr. Hazard: We will go back on the record.

It is stipulated that there are 18 bays of which the one, the fishway gate on the Washington side, is No. 1, and the fish bay on the Oregon side is No. 18.

Mr. Carney: They are numbered consecutively.

Mr. Standing: So stipulated.

Mr. Carney: So stipulated.

Mr. Hazard: Off the record.

(Discussion off the record.)

Mr. Hazard: It is stipulated that the bay into which it was intended to put the timber crib was numbered Bay 9.

Q. It is your recollection that the bays, except for the fishway bays, that seven were at the time before Mr. Claterbos made his request, seven were open; is that correct? [21]

A. No, seven were closed.

Q. You say that seven were closed and that nine——

A. It is my recollection at this time that seven on the south end of the spillway were closed.

Q. Seven on the south end of the spillway, not seven altogether. I am just trying—we have 16 bays. Off the record.

(Discussion off the record.)

Mr. Hazard: It is stipulated that on Wednesday, August 18th, at the time you had the discussion with Mr. Claterbos that Bays 11 through 17

(Deposition of Patrick J. Leonti.)

were closed; that 18 may have been open a little bit.

Mr. Carney: Approximately eight inches.

Mr. Staring: Is that right, Mr. Leonti?

The Witness: That is correct. I am basing this on the premise that my discussion with——

Mr. Carney: What was the question that you asked?

Mr. Hazard: I had asked him how many were closed, and he said seven, but I had thought that seven meant seven of the 16, but it is your recollection that that was seven of those on the Oregon half?

The Witness: That again now does not include the fishway bays, these No. 1 and No. 18.

Q. Well, we will disregard the fishway bays.

A. We are concerned now with the 16, let us say, in the center of the spillway? [22]

Q. Yes.

A. It is my recollection that seven were closed, and I am thinking of the seven nearer to the Oregon side.

Q. Do you have any recollection as to the open or closed status of the ones on the Washington side? A. I do not have, no, personally.

Q. Do you recall whether all of them were open?

A. All 18 gates, you mean?

Q. No, all on the Washington side were open?

A. At what time?

Mr. Carney: I am going to object at this point to the use of this term of "Washington side" be-

(Deposition of Patrick J. Leonti.)

cause I think that it would be more accurate to talk about bay number.

Mr. Hazard: All right; we will go back to our numbers.

(Discussion off the record.)

Mr. Hazard: I have marked on Plaintiffs' Exhibit No. 1 in pencil Nos. 1 through 18 in the base of the spillway dam. I believe it is stipulated that that is the correct number designation of these bays?

Mr. Carney: So stipulated.

Q. (By Mr. Hazard): You said you did not know the numbering system of these bays, Mr. Leonti?

A. I wasn't sure that the fishway bays were included in this numbering, but I do now recollect that that is the case, only I didn't want to go on record as stating positively that [23] No. 1 was the north fishway bay.

Q. What I am getting at at this time a week prior to the accident did you think of the bays as the Washington side and the Oregon side?

A. No, we thought of them as north and south.

Q. North and south. Did you then know the numbers of the bays?

A. Yes, I had a—at the time that I was on the job, first arrived on the job, I was——

Q. Did you know that the crib was to go into what was designated as Bay 9? A. Yes.

Q. Now, when we speak of the north side do you mean the 17 bays excluding the fishway bay on the

(Deposition of Patrick J. Leonti.)

north side, starting with 8, and running northwardly 8, 7, 6, and so on? A. As being open?

Q. No, as being Washington or north side. Where was your axis north and south in your frame of reference?

A. Well, I could be referring to a north bay and be thinking in terms of Bay No. 15, for instance. I would not have a demarcation line somewheres in the center of the spillway and make everything south of that south and everything north of that north.

Q. You did not have a particular axis?

A. Just the relative position of one bay to another. [24]

Q. Well, relative to Bay No. 9, do you have any recollection as to how many bays were open north of No. 9? A. North of No. 9?

Q. On Wednesday.

A. On Wednesday? No, the exact number I do not have a recollection of. There were bays open because the dam was spilling water. How many were open and how many dogs on each day I would not have any way——

Q. Do you have any recollection, of your own recollection, that some were closed?

A. On Wednesday I can't remember any were closed. There may have been some closed during a portion of the particular day and opened subsequently or before, let us say, my time of discussion with Mr. Claterbos.

(Deposition of Patrick J. Leonti.)

Q. Do you have any recollection whether Bay 9 itself was open or closed that day?

A. Whether it was open or closed on Wednesday, no, I don't have any recollection.

Q. What did Mr. Claterbos—did he explain to you he wanted bays closed?

A. Yes, he wanted to proceed into Bay 9, as I previously stated, with a barge and to sound off the sides of the barge on the ogee section of the spillway in that particular barge to try to determine more accurately the actual existing condition [25] of the ogee in Bay No. 9.

Q. You say "more accurately." More accurately than what, Mr. Leonti?

A. Our plans showed the condition, the original condition of the ogee section.

Q. As it was built in 1933 or '4?

A. That is right; and he wanted to try to find out whether conditions had materially changed from what was indicated, let us say, in the drawings.

Q. Was he under the impression that there might have been a change, a material change?

Mr. Carney: I object to the form of the question. How would he know what——

Q. (By Mr. Hazard): Did he indicate to you that he was under the impression——

Mr. Carney: Pardon me; who are you talking about, Mr. Larson or Mr. Claterbos?

Mr. Hazard: Mr. Claterbos, the man he said he talked to.

(Deposition of Patrick J. Leonti.)

Q. Did Mr. Claterbos indicate to you that he thougnt there might be a material change?

A. Yes, it appeared to them, and when I say "them," the contractor, that the possibility existed that there was, that there could be a material change in the condition of the spillway.

Q. Had you formed any impression on that subject yourself? [26]

A. None whatsoever; no, sir.

Q. Did you think there was such a possibility?

A. Well, let me say this, that we were under contract to correct or repair dams, and it was possible that conditions of the spillway itself as well as the particular work that we were going to repair could have been changed from what it was originally.

Q. Was there any available data one way or the other, to your knowledge?

A. As to the condition of the——

Q. As to whether there had been a material change from the original?

A. No, we had no record of any material change in the condition of the spillway itself.

Q. You say yourself that you did not know whether there had been such a change?

A. No, I didn't.

Q. Did you discuss in detail with Mr. Claterbos the manner in which he would make the measurements?

A. He explained to me, as I have stated already, that they would attempt to bring a barge into Bay

(Deposition of Patrick J. Leonti.)

No. 9 and to sound with a leaded weight off the sides of the barge and attempt to determine the, let us say, the actual condition of the location of the concrete surface in that particular bay.

Q. Did you say that he had asked you to have some of the [27] gates closed; is that correct?

A. Yes.

Q. Just what did he ask you to do?

A. Well, after explaining what he planned on doing, he asked that the gates in Bays 10 and 9 be closed for a definite period on the following Friday so that they could perform the operation that they had in mind.

Q. Did he designate them by number?

A. Well, I started to say earlier that my recollection of Gates 11 through 17 as being those that were closed was premised on the fact that he made a request, definite request to close Gates 10 and 9, which were open, so as to effect the complete closure of the gates on the south portion of the spillway.

Q. Did he ask you, did he refer to them by number? A. Yes.

Q. Did he mention Spillway 8? A. No.

Q. Do you know whether Spillway 8 was open at that time?

A. Well, on Friday, now, or Wednesday?

Q. No, on Wednesday.

A. I can't recall whether it was open or closed on Wednesday.

(Deposition of Patrick J. Leonti.)

Q. Do you have any idea what time of the day this discussion was?

A. Oh, no, not exactly. I would say that it was sometime [28] in the morning of the 18th.

Q. Would you say the first thing in the morning or mid-morning?

A. Well, I would again guess mid-morning.

Q. According to your best recollection, it was mid-morning? A. Yes.

Q. Is that, do you understand that as 10:00 a.m., roughly?

A. That is right; I am thinking roughly of times between 8:00 a.m. and noon.

Q. So that sometime, according to your best recollection, sometime around 10:00 a.m., give or take a half-hour, is your best recollection as to when this conversation took place? A. Yes.

Q. Was anyone else present at that conversation?

A. I don't believe so, and I might add this, that preliminary to the actual discussion that we had face to face he first called me on the phone, let us say, perhaps to tell me that he was coming over to discuss this particular feature.

Q. Did he add anything over the telephone than that he was coming over? A. No.

Q. And to state the purpose—you had no detailed discussion over the telephone?

A. No, the actual details were given when we were face to face. [29]

Q. What happened after this discussion?

(Deposition of Patrick J. Leonti.)

A. Well, I then had to contact others to effect the closure of these two gates, we will say, first to see if it were possible to do so and then to actually effect them at the particular time that it was planned to perform that particular operation.

Q. Who were the others that you had to contact?

A. Well, as I mentioned quite previously here, I was the Project Engineer on Construction for the particular work under the contract, but the dam, the operations of the dam come under the Project Engineer for Operations who is permanently located Bonneville Dam.

Q. What is his name?

A. Mr. Capps, Albert Capps, and it would be, or was my duty, to contact his office to make the necessary plans, let us say, for effecting the closure of the two additional gates.

Q. On Wednesday did you call Mr. Capps?

A. Yes; not Mr. Capps. I mentioned that I called—had to do business through his office. I talked actually initially to a Mr. Leuhring.

Q. How do you spell that?

A. L-e-u-h-r-i-n-g.

Q. You spoke to Mr. Leuhring?

A. That is right.

Q. What did you tell him? [30]

A. Well, I first explained to him what the contractor wanted to do and also explained to him that, explained to him and informed him, let us say, to perform the operation that would be neces-

(Deposition of Patrick J. Leonti.)

sary to get an okeh to shut down gates as I mentioned, 9 and, 10 so as to effect closure of all the gates on the south half—or south portion of the spillway, again with the exception of Fishway Bay 18.

Q. Did he then indicate to whom he would have to go to get approval?

A. No; he indicated, of course, that he would have to get his approval from higher authority and that whenever that came through, why, then, he would inform me as to whether the permission was granted or not.

Q. Did he subsequently call you? A. Yes.

Q. What did he say?

A. Well, that it was going to be all right to effect the closure of the gates in Bays 9 and 10 at the particular time that it was planned to perform the operation.

Q. What was the particular time, what time?

A. It was planned to effect the closure of the gates, of Gates 9 and 10 along with those that had been previously closed, for the afternoon of Friday, the 20th.

Q. I thought we were talking of Wednesday?

A. Pardon? [31]

Q. I am sorry, I thought we were talking about Wednesday, this day that you had the discussion with Mr. Claterbos.

A. It was planned to perform the survey operation on Friday.

(Deposition of Patrick J. Leonti.)

Q. The discussion Wednesday was with respect to a plan to be carried out Friday?

A. That is correct.

Q. What time do you recall you called Mr. Leuhring after that discussion? A. Pardon?

Q. After your discussion with Mr. Claterbos, what time do you recall that you called Mr. Leuhring?

A. I do believe it was, well, let's say almost immediately after Mr. Claterbos left my office.

Q. Sometime in the morning of the 18th?

A. Yes.

Q. What time did Mr. Leuhring call you back?

A. Not until the following day did we get the okeh.

Q. Do you recall what time that was?

A. Of the following day?

Q. Yes. A. No, I do not.

Q. Morning or afternoon?

A. It would be just a pure guess on my part to say that it was either morning or afternoon.

Q. You have no recollection. Did you have any other [32] discussion with Mr. Claterbos after the 18th with respect to closing those gates?

A. Well, I had discussion with him, of course, after I got the okeh from Mr. Leuhring. I in turn passed that on to Mr. Claterbos.

Q. You told him that—exactly what did you tell him?

A. Well, I told him that the operations office of the project would close the gates 9 and 10 in

(Deposition of Patrick J. Leonti.)

addition to the—I mean, keeping the gates that were already closed closed for the period that he requested the closure to be done.

Q. Did you have any other discussion with him about closing the gates in this interval between the 18th and the accident?

A. No, I don't believe so except perhaps that he may have checked with me on the morning of the 20th, more or less of a reminder, let us say, to make sure that the gates would be closed for the afternoon of Friday, the 20th.

Q. Do you recall what time he planned to go out? Did he tell you what time he planned to go out?

A. Well, we were to effect the closure for the afternoon, as I say, of Friday, the 20th, immediately after lunch, which ran from 12:00 to 12:30.

Q. So that the closure was to be made at 12:30?

A. That is right, at 12:30, at which time they would proceed with their operation, and the closure was to be for a roughly four-hour period beginning at 12:30. [33]

Q. Were you at the project site on the morning of the 20th? A. At the project site?

Q. Yes.

A. I was at Bonneville; yes, sir.

Q. Were you in the immediate vicinity of where Mr. Claterbos—well, by "project site" I will site the area on the Oregon side right next to the dam. Were you in that area?

A. I wasn't—no, I was in my office.

(Deposition of Patrick J. Leonti.)

Q. Where is your office?

A. In the downstream south control tower of the spillway at Bonneville.

Q. Can you see the face of the dam in there?

A. I can go into the toilet and see the top deck of the dam, and that is all that you might say is visible from the office.

Mr. Hazard: Off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Did you see Larson Construction Company preparing the tug and the barge for the trip?

A. No, that was done entirely away from this particular area that you mentioned. It was done upstream in the so-called forebay area of Bonneville Dam.

Q. What was the nature of that preparation, do you know?

Mr. Carney: I object. He just stated that he didn't see it. [34]

Q. (By Mr. Hazard): When did you first see the tug and barge on the morning of the 20th?

The Witness: On the morning of the 20th?

Q. Or did you first see—did you see the tug and barge on the morning of the 20th?

A. No, I did not.

Q. You did not know where they were at that time? A. Pardon?

Q. You did not know where they were at that time?

A. Not from my own personal visual observa-

(Deposition of Patrick J. Leonti.)

tions. I know that they were, not by hearsay but from others, that they were making their preparations upstream of the dam.

Q. When did you first see the tug and barge on this particular day?

A. I didn't see the tug or barge at all until after the occurrence of the accident. Actually, from then on I didn't see the tug at all until after it was brought to the surface.

Q. On the morning of the 20th you at no time saw either the tug or the barge?

A. No, I didn't.

Q. And at no time up until the accident?

A. No.

Q. Where were you that morning?

A. Most any number of places. I no doubt made a trip or two over to the welding yard. I may have gone over to the [35] Operations Project Engineer's office and possibly may have been down in Mr. Larson's office.

Q. Was there any—do you recall any discussion that morning of the proposed trip to the face of the dam of the tug and barge?

A. With any particular individual now?

Q. With anybody.

A. Well, as I stated earlier, that it may have been that Claterbos may have talked to me either personally or by phone to check to make sure that the closure of the particular gates in question would go through as planned.

Q. Did he tell you where the barge and tug

(Deposition of Patrick J. Leonti.)

were? A. You mean before?

Q. Did he describe to you what he was going—where the barge was and just what he planned to do that particular day?

A. You mean did he definitely locate to me the fact that the barge was in the forebay and would proceed around to the side in question?

Q. That is right.

A. Yes, I would say that he did say that they were making their preparations upstream, and then at a designated time would come down through the navigation locks at Bonneville and then proceed into the particular work area that they were going to perform the operation. [36]

Q. Did you have occasion to look at the face of the dam during that morning?

A. Oh, I guess I looked at the face of that dam every morning. That was where the particular work that we were going to perform was to be performed, and I would naturally be looking over the work site, you might say, practically every chance I had.

Q. Well, during the morning were you at numerous—some intervals in a position where you could see the face of the dam?

A. Well, yes, when I first came to work, why, I would have had occasion to have been in a position to observe the spillway dam itself.

Q. Were there other occasions during the morning?

A. Well, if I—I no doubt did not spend all my

(Deposition of Patrick J. Leonti.)

morning in my office, and, as I say, may have made trips to the welding yard, in which case I would have had to go outside to get into my car to travel to the welding yard, and then again been in a position to observe the spillway.

Mr. Hazard: Off the record.

(Discussion off the record.)

(Thereupon the noon recess was taken, adjourning to 1:30 P.M.) [37]

(The taking of the deposition herein was resumed, pursuant to recess, at 1:30 o'clock P.M.)

PATRICK J. LEONTI

the Deponent herein, thereupon was examined and testified further as follows:

Mr. Carney: We think the record ought to show that Mr. Wood is present, as he was this morning, and with Mr. Larson and Mr. Anderson.

Mr. Erskine Wood: We are making no appearance.

Mr. Hazard: Would the Reporter read the last two questions.

(Questions read.)

Direct Examination—(Continued)

Q. (By Mr. Hazard): Were there other occasions in the morning when you could see the dam, face of the dam?

A. There may have been, but I don't remember at this time.

Q. Do you have any recollection of the open or closed status of the bays on that morning?

(Deposition of Patrick J. Leonti.)

Mr. Carney: Pardon me. Which morning are you speaking of?

Mr. Hazard: Friday.

Q. Is that your understanding, that we are talking about Friday morning of August 20, 1954?

The Witness: Yes, to my knowledge, the gates, as I mentioned before, 11 through 17, were closed.

Q. Do you have any recollection as to the status of the other gates?

A. Not Gates 1 through 8. Definitely, 9 and 10 were open because those are the two gates that were requested by Mr. Claterbos to be closed.

Q. You have no special recollection as to 1 through 8? A. No, not as a group.

Q. Do you have any recollection as to them individually? A. No.

Q. But it is your recollection on the morning of Friday, the 20th, that 9 and 10 were open?

A. Yes.

Q. Do you know what time the tug and barge set out to reach the face of the dam?

A. From the forebay, no.

Q. Did you see them on the water approaching the dam? A. No, I did not.

Q. You did not see them sink, either?

A. No.

Q. The first knowledge that you had that the trip was actually under way was after it had occurred and the craft had been sunk?

A. That is correct. [39].

Q. Do you have any knowledge whether or not

(Deposition of Patrick J. Leonti.)

Bays 9 and 10 were closed? A. You mean——

Q. At the time that the craft approached, or, that is, do you have any knowledge, did you receive any word at any time Friday morning or make any observations Friday morning noting that 9 and 10 had been closed?

A. The complete closure of Bays 9 and 10 was effected just prior to the planned operation. Sometime in the morning 9 and 10 were open, but just prior to the operation, as planned, 9 and 10 were closed by the Project Operations personnel.

Q. Do you have personal knowledge of that?

A. Yes.

Q. How did you determine that?

A. Well, I rechecked with Mr. Leuhring that gates in Bays 9 and 10 would be closed.

Q. You did that sometime during Friday morning? A. Yes.

Q. What did he inform you?

A. That they were closed down, the gates in Bays 9 and 10, as planned.

Q. Did you see them after they had been closed?

A. I didn't make a specific trip to do that, but sometime prior to the operation in one of my trips, why, I did see to it that the Bays 9 and 10 and the others were closed as [40] planned.

Q. You observed that they were closed?

A. Yes.

Q. Did you make any observation about Gate 8?

A. No, I didn't check further on from 8 up through 1 to make sure that each individual gate

(Deposition of Patrick J. Leonti.)

was closed, but I did make sure, ascertain that 9 through 17 were closed.

Q. Do you have any recollection whether 8 was closed at the time you made your observation with respect to 9 and 10?

A. No, I can't say as I remember making a particular definite point to check that the gate in Bay 8 was closed.

Q. Do you have any recollection, in fact, whether they were closed? A. No.

Q. I am sorry; we are talking about Gate 8. You have no recollection whether it was closed?

A. No.

Q. You think you observed that 9 and 10 were closed sometime the late morning of the 20th?

A. Yes, it was, oh, I went to lunch, regular lunchtime, 12:00 to 12:30, and prior to that I had made the observation that, well, that is as I say, I rechecked with Leuhring to make sure that the plan was going to go through and then observed that that was the case.

Q. After that observation you do not recall having looked [41] — do you recall having looked at the dam between then and before the accident?

A. No; no. I mentioned that I was at lunch 12:00 to 12:30. Do you mean between?

Q. Well, I mean sometime in the late morning before lunch. You say you observed that 9 and 10 were closed, and that you do not have any recollection about 8? A. That is right.

Q. After that observation, do you recall observ-

(Deposition of Patrick J. Leonti.)

ing the dam, this portion of the dam, before the accident occurred?

A. No, I do not recollect that I made a second check.

Q. Is it correct that your next information about this transaction was your learning that the tug and barge had sunk? A. That is correct.

Q. How did you discover that?

A. Actually, Mr. Larson informed me. We happened to be talking on the phone at the, let us say, the time of the accident, and he received the message verbally perhaps or somehow or other that a distress signal was being given perhaps that there was a man overboard, and he immediately hung up, and I believe so did I. It was actually, let us say, coincidental in the phone conversation with Mr. Larson that I knew of the accident.

Q. Did he tell you over the telephone that it had sunk? [42]

A. No, he mentioned that he had received a message that there was a man overboard.

Q. And then he hung up?

A. That is right.

Q. What did you do then?

A. Well, then, I hung up, of course, and went down from my office out onto the fishway approach deck to try to observe what was happening In the length of time it took me to go from my office out to the deck it actually, you might say, was all over.

Q. What did you observe from the deck?

A. Pardon?

(Deposition of Patrick J. Leonti.)

Q. Did you observe the tug or the barge?

A. I did not see the tug at all. I did see the barge. The barge remained afloat for a few minutes, and then it broke up and the pieces went downstream.

Q. When you observed it where was it?

A. Exactly I don't recall. I didn't make an effort then to determine its exact position, but it was somewheres in the north half of the spillway.

Q. Well, let us establish the axis of observation. First, about how far away from the dam was it when you observed it?

A. It was right close to the dam itself.

Q. Five or ten feet?

A. Well, it would be pretty hard to determine. It may have [43] been in against one of the piers.

Q. Did it appear to be perhaps bumping into or in contact with one of the piers? A. Yes.

Q. So it was right close to it, touched it?

A. Yes, it——

Q. Was there water spilling from one of the gates at that point?

A. Yes, it was spilling. As I say, it was somewheres in, let us say, the north half of the spillway.

Q. Was the open water between you and the barge? A. Pardon?

Q. Was the open water between you and the barge? A. Open water, I don't——

Q. I am talking about now the waterfall from the open gates. There was an open gate; is that correct?

(Deposition of Patrick J. Leonti.)

A. Yes, there were gates open, as I say, on the north half of the spillway. Those on the south half again, 9 through 17.

Q. 9 to 17 were closed? A. Were closed.

Q. Do you recall whether 8 was open?

A. No, I didn't, I didn't make an effort to check the exact number of gates that were open.

Q. You did not form——

A. I did know where, I did know where Gate 9 was and counted [44] 9 down through 17.

Q. Did you observe that 8 was open, that No. 8 was open?

A. Well, there were a number of gates on the north half that were open. The exact number I personally did not make an effort to check.

Q. Well, did you say that you observed that 9 through 17 were closed? A. That is correct.

Q. Did you observe the next one going north was open?

Mr. Carney: He just testified he didn't.

Mr. Hazard: Well, I want to see if by making the other observation——

The Witness: No, I didn't make an effort to check the position of every gate, 1 through 18. As I say, I did know where Gate 9 was, or Bay 9, counted from Bay 9 through 17. I did check that those were closed.

Q. Was there an open spillway between you and the barge when you observed it?

A. I don't recall the exact position of the barge, whether it was in front of Bay 8, 6, 3, 4, or what-

(Deposition of Patrick J. Leonti.)

ever it was, but there was open water in the immediate vicinity of the barge when I observed it.

Q. Did the water appear to be hitting the barge?

A. Well, the barge was moving in and out, let us say, at times, and water was hitting the barge, and at times the [45] barge was clear under the cascade of water.

Q. It was moving in and out under the cascade? A. That is right.

Q. And it bounced around in that manner, you say, and then broke up; is that it?

A. Yes, it broke up, and the individual pieces eventually floated on downstream.

Q. Did you see any men on the barge?

A. No.

Q. Did you see any men in the water?

A. No.

Q. Did you have an opportunity to observe about how high the cascade of water was, that is, the difference in height between the place where the water was coming out and the place where it was hitting the water on the downstream side?

A. Well, I just don't quite get what you are asking.

Q. I will see if I can phrase it a little more meaningfully. There was a cascade of water coming from some gate or gates that you observed?

A. Yes.

Q. About how high, what was the vertical height of the cascade, how high was the waterfall?

A. Oh, I made no attempt to measure.

(Deposition of Patrick J. Leonti.)

Mr. Carney: How high with reference to what?

Mr. Hazard: Well, from the top of the moving waterfall [46] to the water level of the water in which it was spilling. Do you follow what I am getting at? Off the record.

(Discussion off the record.)

The Witness: I will say my answer would be the same. I made no attempt whatsoever to determine any height of waterfall, let us call it.

Q. Can you form any estimate?

A. Pardon?

Q. Can you form any estimate?

A. No, I would say let us say not. The distance between me and that was such that my estimate would be anywheres from a foot to 20 feet.

Q. Was it about 20 feet as opposed to about a foot?

A. No, I would say that there is no question but it was different elevations. It did range in the magnitude of one foot to 20 or perhaps 25.

Q. On previous days is it your recollection that the water level below the dam was about the same as on this day?

A. You mean what we call the elevation? You mean what we call the so-called elevation?

Q. The lower side of the waterfall with respect to the dam. I mean out to the base of the dam, the water below the dam. A. From what datum?

Q. From the bottom of the spillway or the open —off the record. [47]

(Discussion off the record.)

(Deposition of Patrick J. Leonti.)

Mr. Hazard: Back on the record.

Q. As I understand it, the elevation of the tailrace is the water level below the dam. With respect to the elevation of the tailrace, was the elevation of the tailrace on the days, the four or five days that you were there before, and including the 20th, approximately the same?

A. Well, I don't recall now what the tailrace elevation was for any one day, but records were kept and are still being kept, for that matter, of these various elevations.

Q. I am asking you do you have any recollection as to whether there was any apparent change in the elevation of the tailrace?

A. No, I do not know now whether in that, let us say, five-days period, whether it had remained at a constant figure or whether it had changed from one day to another.

Q. You do not recall that it made any—do you recall that it did not make any substantial change? Do you have any opinion on it at all?

A. Well, I can say that I can recollect that it did not make any substantial change. It no doubt changed but not——

Q. It was reasonably uniform; is that your recollection, or relatively uniform?

A. Well, if you are comparing the 20-foot descent, why, it was; but if you are comparing 20 feet to 21, why, it was a [48] drastic change.

Q. Within those terms it was relatively uniform. Now, then, did you have any occasion to make an

(Deposition of Patrick J. Leonti.)

observation of the fall of water from an open gate to the tailrace, and can you give us any opinion, do you have any recollection as to the approximate drop?

A. No, that would not have been anything that I would have been concerned with or for that matter interested in, as to the height of the drop or anything like that.

Q. You have no recollection of that?

A. No.

Q. I believe you stated initially, Mr. Leonti, that you are an engineer. Are you a graduate engineer? A. Yes, I am.

Q. In what sort of engineering? A. Civil.

Q. You stated that you have been working largely on dams for the last eighteen years?

A. That is correct.

Q. May I ask from what college you graduated? A. Northeastern University.

Q. Is that in Boston? A. That is correct.

Q. In your eighteen years of working with dams have you ever undertaken or been a project engineer or associated with [49] the project engineer on a project similar to this one? A. No.

Q. Have you knowledge of projects similar to this one? A. No, I do not.

Q. Do you know of a project similar to this one ever being undertaken?

A. Before or since?

Q. Before—at the time.

A. No, I have no knowledge of such.

(Deposition of Patrick J. Leonti.)

Q. To your knowledge, this was the first project of this type? A. No, I won't say that.

Q. Explain if you wish.

A. Well, let me say this, that to my knowledge —well, now, I am getting all twisted up. Let us have your question again now.

Q. To your knowledge, is this the first project of this type, and by project I mean dewatering a dam in this manner for repair purposes—is this, to your knowledge, the first type?

Mr. Staring: Do you mean as far as he knows?

Mr. Hazard: Yes, I am asking as far as he knows.

Mr. Staring: As far as he knows is the question.

The Witness: Yes, as far as I know, why, it, again to my knowledge, is the first job of this type.

Q. (By Mr. Hazard): Have you ever read or studied about any other projects?

A. Have I what?

Q. Have you read accounts or studied about any other projects of this type?

A. No, I have not.

Q. In your previous experience had you ever encountered problems of dewatering below a dam?

A. No.

Q. Had you ever encountered projects involving the repair of a dam? A. No.

Q. Was your previous experience confined to original construction of dams?

A. That is correct.

(Deposition of Patrick J. Leonti.)

Q. In those original construction projects did you ever run into a situation where there was a falling body of water in the construction area?

A. Well, yes. I mean, all dams are constructed on bodies of water with water falling. Now you are saying that in a similar job. I wasn't in any similar type job.

Q. I see, sir; but I am asking now, you said there had not been any similar types of jobs to your knowledge. Now, have there been similar problems; that is, the problem of falling water in the vicinity of the work in other jobs that you have [51] encountered?

A. Well, I don't know what you mean now again by falling waters. As I started to say, we are involved in water in construction of any dam. There is always a water problem to be considered.

Q. Well, I am talking about it because I do not know anything about building a dam; but when you build a dam on projects that you have been engaged before have you ever had a situation where work had to be done next to falling water?

Mr. Staring: There is no testimony here that any work had to be done next to falling water.

Mr. Hazard: Well, that may be—or where work was done next to falling water.

The Witness: Well, I did mention that I have been on the original dam construction, it being no occasion for there being any falling water present. Falling water is made after a dam is in existence.

Q. (By Mr. Hazard): So that you had never

(Deposition of Patrick J. Leonti.)

run into this particular situation before, a situation similar to this where falling water——

A. Of working in an existing dam where water is cascading out of the spillway, no, I mentioned that I hadn't.

Q. You mentioned earlier that Gates 11 through 17 were closed on both Wednesday and Friday of the week of which we [52] are speaking; is that your recollection?

A. No, I don't think I mentioned that I absolutely knew that Gates 11 through 17 were closed on Wednesday. I did mention that they were closed on Friday.

Q. Were they closed on Wednesday?

A. I don't remember.

Q. You don't recall. Do you have any recollection of Gates 11 through 17 being closed simultaneously and being kept closed?

A. 11 through 17?

Q. Yes.

A. No, I personally do not have any recollection of when Gates 11 through 17 were closed.

Q. Did you have any discussion with any of the employees of the Larson Construction Company with respect to the closing of Gates 11 through 17?

A. No.

Q. Do you know how it was that those gates were closed on Friday, August 20th?

A. 11 through 17?

Q. Yes.

A. They were not made to close or put on seal,

(Deposition of Patrick J. Leonti.)

as the expression goes, on the 20th. They had been closed previously; just when I don't remember. The records are kept at the dam whenever any operations of that nature are performed. [53]

Q. Does "put on seal" mean anything different than closing? Does it mean permanent closing?

A. No, it means closing.

Q. You had no knowledge of how it was that 11 through 17 were closed. You say that on the 18th you do not recall their being all closed. On the 20th you do recall that they were all closed. Now, is it your testimony that you don't recall how it was that they came all to be closed? That is, did you transmit any requests, for example, from the Larson Construction Company that those be all closed?

A. You say now did I get a request from them? Their request was that Gates 9 and 10 be closed to effect a complete closure from 9 through 17. Now, as to when Gates 11 through 17 themselves were closed, I have no recollection, but records kept at the dam would show when they were closed.

Q. Do you have any recollection as to their open or closed—11 through 17—open or closed status before the 20th; any recollection at all?

A. Well, I am remembering that some of them were closed. Just how many were closed and how many were open and at what time I have no recollection.

Q. Did you have any discussion with Larson

(Deposition of Patrick J. Leonti.)

Construction Company about closing those Gates 11 through 17?

A. Well, as I mentioned before, the request was that we close Gates 9 and 10. [54]

Q. Yes, I understand.

A. So as to make the complete closure from 17 up through 9.

Q. Was there any discussion about 11 through 17? A. No, not specifically for those gates.

Q. Did you understand that those gates were to be closed, 11 through 17?

A. I understood that when we closed or had Gates 9 and 10 closed then we would have a complete closure from 9, as I say, through 17.

Q. Did I understand that you understood that 9 and 10 would be specifically closed, but sometime before or immediately thereafter 11 through 17 would also be closed; is that correct?

A. Either would be closed or had been closed. As I say, as to when the Gates 11 through 17 were actually closed I do not recollect.

Q. Did you have any conversation with Mr. Tobias with respect to this project going out to the dam? A. Yes, I did.

Q. What was that discussion?

A. Well, on the morning of the 20th was when I had my discussion with him, and then he, you might say, repeated in substance just what the operation was that he was going to perform, repeated the operation similar to what Claterbos had previously [55] represented to me.

(Deposition of Patrick J. Leonti.)

Q. That is, he told you that they intended to move the tug and barge out into Bay 9 and make measurements on the ogee? A. That is right.

Q. Was anyone else present at that conversation?

A. I do not remember that there was.

Q. Do you recall any discussion then about Gate No. 8? A. No, I do not.

Q. Do you recall whether that discussion was held at a place from which you could observe Gate No. 8?

A. That was held in my office, and from my office, why, I had no direct line of viewing the job site.

Q. Was that conversation before you conversed —with Mr. Claterbos—was that conversation before you conversed with Mr. Leuhring?

A. I don't recall whether it was before or after.

Q. Was it before you checked late in the morning about——

A. It was before recheck just before lunch to see that the Gates 9 and 10 would be closed.

Q. You recall no discussion about Gate No. 8?

A. No.

Q. Did you have any knowledge or impression as to the open or closed status of Gate 8 at the time of that conversation? A. No, I didn't.

Q. Did Mr. Tobias seem to have—did he appear to have any [56] impression about the open or closed status of Gate No. 8?

A. That wasn't in the discussion at all.

(Deposition of Patrick J. Leonti.)

Q. Did you have any assistants or superiors on the project? A. Pardon!

Q. Did you have any subordinates or superiors on the project site?

A. I had subordinates.

Q. Who were they?

A. Or a subordinate at that time.

Q. Who was he? A. Otto Miller.

Q. Miller? A. Miller.

Q. Was he present at any of these conversations? A. No.

Q. Do you know whether he knew of the proposal to go out into Bay 9?

A. I don't recall that I ever talked with him about it.

Q. You do not know whether or not he was aware of that? A. No.

Q. In your discussion with Mr. Claterbos or Mr. Tobias were you informed of the manner in which it was proposed to rig the barge and tug?

A. To rig it, you say?

Q. That is, how they were to be tied to one another? [57] A. No.

Q. Did he describe to you in any particulars how they were going to push out into Bay 9?

A. No, the actual navigational problems were not discussed. It was just what was to transpire when they did get into Bay 9.

Q. Did he indicate to you that he would push the barge into Bay 9?

A. No; there was, as I say, no discussion made

(Deposition of Patrick J. Leonti.)

as to the preliminaries in getting the barge into 9 but what was to take place once the barge was in Bay 9.

Q. Did he discuss with you the manner in which he proposed to anchor in Bay 9? A. No.

Q. Did he use simply the phrase, "We will make fast to it"; something like that?

A. Not to my recollection.

Q. At the time of your conversation or conversations with Mr. Leuhring did Mr. Leuhring make any comment about the proposal to go out—first let me say did you inform Mr. Leuhring of the plan to send a barge out into Bay 9?

A. No, I *am* informed Mr. Leuhring initially that the request was in to have Bays 9 and 10 closed for the purpose of sounding and determining the condition of the spillway in that particular bay.

Q. Did you mention to him that, in a general way, the manner in which sounding was to be conducted?

A. Well, only to the extent that I told him it was to be done from a barge to be sent in.

Q. Did Mr. Leuhring make any comment about Gate No. 8? A. No.

Q. Did you make any comment to him about Gate 8? A. No, I didn't.

Q. There was no discussion between you except, as you said, in two or three conversations that you had with Mr. Leuhring, is that correct, as to just what was intended, what Larson intended to do out there? A. No.

(Deposition of Patrick J. Leonti.)

Q. It was a very brief conversation?

A. My conversation with him essentially was that the request was in to effect a closure of Bays 9 and 10 at the prescribed time.

Q. And that they were going to take this barge out there to go into Bay 9; is that correct?

A. That is correct.

Q. Did you at that time have any knowledge of the navigational rules with respect to the dam and the craft in the vicinity of the dam?

A. Navigational rules, do you say?

Q. Do you know whether or not there are navigational rules [59] relevant to bringing craft in the vicinity when the downstream is high?

A. You mean generally speaking or for them to perform that contract?

Q. Generally speaking.

A. No, I don't know that.

Q. You do not know whether or not there are regulations? A. No, I do not.

Q. Were there any particular regulations with respect to this particular contract?

A. Regulations, no.

Q. Or rules of some kind?

A. No, it should have been understood by all that we would have floating equipment to perform the work involved.

Q. But you know of no rules or understandings as to the manner in which that was to be conducted? A. No.

Q. Mr. Leonti, were you able to form any opin-

(Deposition of Patrick J. Leonti.)

ion as to the quantity of water which came through a gate which was open, let us say, open a small way?

Mr. Carney: I object to that. I do not think the question is sufficiently specific.

Q. (By Mr. Hazard): Of the gates that you observed to be open during this week, are you able to form, or were you able to form any opinion as to the quantity of water coming through? [60]

A. Through any one open gate?

Q. Yes. A. None whatsoever.

Q. Do you have any engineering knowledge for estimating a quantity of water that comes through a gate?

A. It is so variable there is no concrete rule for water coming out through a gate. There are so many variables in it that there is no one specific, let us say, rule-of-thumb method of determining.

Q. You formed no opinion as to the quantity of water? A. No.

Q. As to the velocity of the water?

A. Pardon?

Q. As to the velocity of the water, had you formed any opinion as to the relative turbulence of the water in the immediate vicinity of the place in the tailrace where water from an open gate hits the tailrace gate?

A. The amount of turbulence?

Q. Yes.

A. Well, again measured from what datum?

Q. Well, I don't know; I am not an engineer,

(Deposition of Patrick J. Leonti.)

but I suppose that you have turbulences in—is that something one can discuss? Are there engineering datum by which you measure turbulence?

A. There are no specific units for the measurement of [61] turbulence.

Q. How do you engineers discuss turbulence, then, in terms of intensity?

A. Well, just using laymen's terms, that it is mild, severe, or moderate.

Q. Then using laymen's terms, do you have any opinion as to the turbulence of the water at the place where it was hitting the spillway and where the spillway water was hitting the tailrace water at this particular time? Would you describe it as severe, mild?

A. Well, now, at what time are we specifically talking about?

Q. On the 20th.

A. On the 20th, the morning?

Q. You said you observed several gates open on the afternoon of the 20th when you——

A. Do you mean turbulence immediately in front of the open gate?

Q. Yes.

A. Or perhaps turbulence, if any, in a location where the gates are not spilling?

Q. Let us take, first, immediately in front of an open gate.

A. Immediately in front of an open gate. My first question is how many dogs is the gate open?

Q. Well, let us assume it is open one dog. [62]

(Deposition of Patrick J. Leonti.)

A. One dog, why, I would say that the turbulence is moderate.

Q. How about five dogs? A. Severe.

Q. How about three? A. Oh, severe.

Q. How about two dogs — somewhere between moderate and severe, I take it?

A. Well, as I mentioned, there are so many variables which will vary the turbulence in front of a gate when it is at two dogs.

Q. How about the turbulence of the water at one dog and the water in the bay adjacent to a bay which is open?

A. Well, I have not made any specific observations.

Q. Have you made sufficient observation to form any opinion?

A. No, no. I—as I say, I wasn't concerned with the amount of spillage and the turbulence. I personally did not make any observations as to what the severity of it was.

Q. You say that Mr. Miller was your subordinate; is that correct? A. That is correct.

Q. Did you have any other subordinates?

A. At that time no.

Q. Or assistants to Mr. Miller? Was he the "bottom man on the rung," so to speak? [63]

A. At that time there was just the two of us.

Q. In the five days or four and a half days before this event did you say you had some conversations with Mr. Larson? A. Yes.

Q. And members of his company?

(Deposition of Patrick J. Leonti.)

A. That is correct.

Q. Did Mr. Larson indicate that he had experience in dam work?

A. Well, he would not have had occasion at that time to inform me of his experiences in that type of work.

Q. In your short conversations with him prior to the 20th did you form any opinion as to his experience, of him and his men, in working on dam work?

A. No; as I say, I first got to know Mr. Larson on that particular job. I did not know him prior to it, and I would not have had time in the four, four and a half days, to form opinions as to his qualifications or experience in similar type of work.

Q. Did he make any statements to you about this being the first kind of job of this kind that he had ever done? A. No.

Q. Could you amplify a little bit on what your duties on this project were, Mr. Leonti?

A. Well, essentially, to see to it that the contractor performed the job as required by the specifications. [64]

Q. As to quality, time, and so forth?

A. In that he met the qualitative specifications and within a time allotted for the job.

Q. Was it your job to relay to your superior—who was your superior at that time?

A. My superior, well, I worked under the Construction Division in the Portland District Office, chief of which is Mr. John Kemple.

(Deposition of Patrick J. Leonti.)

Q. He was your immediate superior?

A. Pardon?

Q. He was your immediate superior?

A. He was the Chief of the Construction Division. I received instructions and orders from him and others among his staff.

Q. You said that Mr. Claterbos asked you to see that Gates 9 and 10 were closed; is that correct?

A. That is correct.

Q. Was there any reason why Mr. Claterbos would not make that request direct to Mr. Leuhring?

A. Yes, there was reason. I was the duly assigned Construction Project Engineer, and any activities that were going on on the job or any changes in the operations provisions of the dam would have to come through me.

Q. You were the liaison man, one might say, between the company and the various personnel relating—— A. In the operations end of it.

Q. To your knowledge was the Larson Construction Company [65] instructed that they should deal through you when it was necessary to communicate with the Operations Division?

A. Yes, they were always aware of that.

Q. That was your understanding?

A. Yes.

Q. During the week of the 16th through the 20th we have discussed that you had conversations with Mr. Claterbos and with Mr. Tobias about closing the gates, and specifically in reference to Gates

(Deposition of Patrick J. Leonti.)

9 and 10, did you have conversation with any of the members of the Larson Construction Company relating to the closing of gates?

A. No. To my recollection, that matter was taken up with me by Mr. Claterbos, and the discussion with Mr. Tobias concerned only the actual operation of the survey ~~in~~ Bay 9.

Q. Do you recall any conversations with any other member besides these two individuals; any other member? A. No, I do not.

Q. Any other member of the Larson Company; not with Mr. Larson?

A. I don't remember having conversation with him specifically for closing Bays 9 and 10.

Q. Do you remember having any conversation with him relative to the problem of closing gates generally? A. Closing gates generally?

Q. Yes; not with particular reference to 9 and 10. [66]

A. Well, we had a number of discussions on that score.

Q. Would you tell us what those discussions were about?

A. Essentially that, closing the gates.

Q. Well, what was said? Who broached the subject?

Mr. Carney: What time are we talking about now?

Mr. Hazard: From the time Mr. Leonti came to the job until the actual disaster involved here.

Q. How did the topic come up?

(Deposition of Patrick J. Leonti.)

A. Just in general conversation, as I say, to the effect that gates would be closed or would have to be closed at various stages of the job.

Q. You talked it over with him and concluded—you both agreed that the gates would have to be closed from time to time; is that correct?

A. Well, yes, that — Mr. Leuhring understood that since we were working below a spillway dam that we would have to have gates closed before we could perform the work.

Q. You say it was understood. How did you so understand it?

A. Well, we were going to erect a cofferdam, and we were going to effect closure of an area in which to do work, and one of the spills, let us say, of the cofferdam was going to be the spillway itself, so, naturally, the gates would have to be closed to effect that a hundred per cent.

Q. Well, would that be for any other purpose than dewatering [67] it to make the work possible? Is that correct; is that what your understanding was?

A. Well, yes, to be in a position to be able to erect different cells of the cofferdam we would naturally have to have gates closed. It would have been humanly impossible to work.

Q. Because of the turbulence thrown up by the spillway?

A. Because of the flow of water right in the immediate work area.

(Deposition of Patrick J. Leonti.)

Q. Was the immediate problem one of getting the water out of the cofferdam enclosure?

A. I am referring now to the time for installation of the cofferdam, erection of the cofferdam.

Q. Was it your opinion, in view of the engineering problems, that they would have to have two gates closed at the points where they were working in order to be able to get the cells erected?

A. That is correct.

Q. And the timber cribbing erected?

A. That is correct.

Q. Are the reasons for that opinion that the flow of the water, the turbulence and pressure of the water, would kick the cells about or the timber cribbing about and make it impossible to line them up properly? A. That is right. [68]

Q. How heavy was this timber cribbing, Mr. Leonti, the wooden structure itself?

A. You mean how much did it weigh totally?

Q. Yes.

A. I don't recall that I personally determined what it did weigh.

Q. Did you form an opinion?

A. No. Well, did I form an opinion then, or would I know?

Q. Did you then? A. No.

Q. Have you formed an opinion in any way of a rough estimate to arrive at your conclusion that it would be difficult to put it in place if the spillway were not closed?

A. You mean because due to its weight?

(Deposition of Patrick J. Leonti.)

Q. Was the weight of the thing a factor in your considering the difficulty of getting a place where your spillway——

A. No, it could have been anywhere from a tenth of a block to something the size of this building. If one gate were open, it would never have been placed.

Mr. Carney: Are we talking about all the gates or one, or the gate opposite or what?

The Witness: Mr. Hazard mentioned working in front of the open gate.

Mr. Carney: You are now talking about the open gate immediately opposite where the work is?

Mr. Hazard: Well, let it stand at that.

Q. How about the gate next to it? How about the gate next to the bay where you are going to put in a crib?

A. You mean the difficulty involved in actually setting the crib in the bay with water in the next bay?

Q. Yes.

A. I never formed an opinion as to whether that would be feasible or not.

Q. In addition to the specific request by Mr. Claterbos for Gates 9 and 10, were any other specific requests made prior to the accident with respect to closing gates?

A. By whom is that? Mr. Claterbos?

Q. Any member of the Larson Construction Company. A. Any specific request?

Q. Yes. A. No.

(Deposition of Patrick J. Leonti.)

Q. The only gates that were specifically requested to be closed during this time were the 9 and 10 by Mr. Claterbos? A. That is correct.

Q. Were there any requests by any member of the Larson Construction Company to close all the gates except, let us say, 1 through 6—1 through 5 on the Washington side? Was there ever a general request to close all of them except the ones on the extreme north side?

A. You are referring now again to this time?

Q. Yes.

A. It would be—the day of the accident or just prior to it?

Q. During that first work. A. No.

Q. Did you discuss with Mr. Larson or any member of his company the readiness, the willingness of the Government to close gates—did you have any discussion about the difficulty of getting gates closed in this week?

A. No, I did not discuss anything like that because I myself would not have known of the difficulty. All our discussions consisted of was that his request to me would have to be put to the Operations office and that the granting of the request would have to come through the Operations office.

Q. You had no opportunity to observe whether or not those requests would be readily granted except your experience with 9 and 10?

A. No, at that time I would not have been able to form an opinion as to how rapidly any request that we put in would have been met by the Opera-

(Deposition of Patrick J. Leonti.)

tions office, but I knew that the request would have to go from me to them to effect the closure of the gates.

Q. Did you form any opinion as to the—off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Were you able to form any opinion at [71] that time about the danger of taking a barge in the manner proposed by Mr. Claterbos into Gate 9, Bay 9?

A. You say was I able to form an opinion?

Q. Did you form an opinion on it?

A. No, I did not.

Q. Did you form any opinion whether or not there would be any suction activi tending to draw the barge sideways if there were an open spillway next to where——

A. That is essentially the same question. My answer is still No, I did not form an opinion.

Q. Did you consider the problems?

A. Pardon?

Q. Did you consider the problems?

A. No.

Q. Have you considered the problems since then? A. Pardon?

Q. Have you considered the problems since then?

A. Considered the problem since then?

Q. Yes, have you considered the effect on a boat of the size of this barge passing into a bay next to an open spillway? Is it your opinion as an

(Deposition of Patrick J. Leonti.)

engineer there would be any suction activity, any sideways activity?

A. I have not made studies along those lines, if that is what you mean?

Q. Have you formed any opinion? [72]

A. Pardon?

Q. Have you formed any opinion? Have you formed any opinion on its effect?

A. No, I have not.

Mr. Hazard: Off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Mr. Leonti, so far we have discussed events up to August 20th. In the procedures which you followed subsequent to August 20th was there any difference in the way you—in the way the gates were handled?

A. Any difference?

Q. Yes. A. Well, with respect to what?

Q. With respect to keeping them open or closed?

A. There were conferences at which that was brought up as a topic of discussion.

Q. What conferences, between whom?

A. Pardon?

Mr. Carney: I think I am going to object to this line of questioning on the ground that subsequent action is not admissible evidence as to what standard of care there might have been.

Mr. Hess: You are not instructing the witness not to answer the question?

Mr. Carney: I am interposing the objection.

Mr. Hess: This is a discovery deposition, also.

(Deposition of Patrick J. Leonti.)

Mr. Hazard: Relevancy is not an objection.

Q. Who was present at these conferences?

A. Members of the Corps of Engineers and members of the contractor.

Q. What steps were taken as a result of those conferences, if any?

A. I can't recall now what the specific steps were that were taken except that, as I say, further gate closure was one of the topics of discussion amongst other topics of discussion in the nature of the business of this particular contract.

Q. Was there a conference called specifically for the purpose of considering safety problems presented by this disaster? A. Pardon?

Q. Was there any conference or discussion concerning, principally concerning the safety problems presented by this sinking?

A. A safety conference?

Q. The safety problems presented by the barge sinking? Now, did you have any conference thereafter with a view to avoid future sinkings?

A. Well, with the, let us say, United States Government and specifically the Corps of Engineers whenever there is an accident, why, there is always an inquiry, a board of inquiry [74] that looks into the accident?

Q. Do they make recommendations?

A. Pardon?

Q. Do they make recommendations for future conduct? A. Yes, they do.

(Deposition of Patrick J. Leonti.)

Q. Did they make any recommendations in this particular instance?

A. Yes, recommendations are made by any board of inquiry.

Q. What were their recommendations?

A. Well, let's see——

Mr. Carney: I am going to object to that on the ground that you are asking this man to state what some other board's conclusions are when he does not have their conclusions and recommendations in front of him.

Q. (By Mr. Hazard): I say, do you recall any of the recommendations that were made?

Mr. Carney: Well, I think we are going to object to having him testify in that regard because the information you are eliciting would not be admissible in the trial because it is an admission of other parties, and, secondly, I do not believe it is available to you.

Mr. Staring: You cannot even get it by discovery by the proper methods.

Q. (By Mr. Hazard): Do you recall who was present at this investigation? [75]

A. Pardon?

Q. Do you recall who was present at this investigation?

A. Well, various members of the Corps and members of the contracting firm.

Q. Do you recall any of their names?

A. Well, again I have got to ask if that is

(Deposition of Patrick J. Leonti.)

considered part of the information that I am requested.

Mr. Carney: I think you can give the names of anybody present if you remember who was present, their names.

The Witness: I probably don't remember them all offhand.

Q. (By Mr. Hazard): Give us such names as you are able to.

A. Well, there is Mr. Neil Chitwood who is District Safety Engineer; Mr. Mark Clayton. These are now working for the Corps of Engineers. Mr. Ray Sandwick.

Q. Those three are the members of the board, is that correct?

A. Yes. Mr. Melvin Webster, and there is myself, of course.

Mr. Carney: You may as you go down tell who each one is. Who is Melvin Webster?

The Witness: Well, Mr. Clayton, Mr. Sandwick—is that his name, Ray Sandwick—Mr. Webster is one of the members of the board. Mr. Chitwood sits in ex officio, I guess you would say.

Mr. Carney: What is his title?

The Witness: He is Portland District Safety Engineer. [76] I don't recall whether Mr. Capps was there or not. Mr. Goebel was there. He is working in the Operations of Bonneville Dam. Mr. Harold Leach who was Chief of Security at Bonneville Dam. Well, let's see now. Mr. Robert Larson was there, the contractor; Harry Claterbos;

(Deposition of Patrick J. Leonti.)

Mr. Davenport, I don't remember his initials. Those are all that I remember. There could have been others, of course, but that is all that I remember.

Q. (By Mr. Hazard): Was there any change in the system of operations with respect to opening and closing the gates after the accident?

A. Any change in the system of operating the gates?

Q. Of making requests to close—relaying requests to close and closing, to your knowledge?

A. Any changes made in the procedure of the requests?

Q. Yes.

A. No, they still were handled in the same way.

Q. Was there any change in the number of gates that were closed?

A. Change in the number of gates?

Q. Yes.

A. Well, there was a change in the number of gates all through the job. Your river discharge varied the number of gates open and closed there.

Q. Were 11 through 17 kept closed at all times when there were personnel in the water area below the dam? [77]

A. Gates 11 through 17?

Q. Yes.

A. Yes.

Q. How about Gate 10?

A. Eventually 10 was kept closed.

Q. You say "eventually." It was not immediately afterward?

A. No, I can't say specifically or state specifically when 10 was kept, let us say, permanently

(Deposition of Patrick J. Leonti.)

closed through the life of the contract, but, eventually, the flow decreased such that all gates within the confines of the work area were closed.

Q. What is the work area that you are speaking of now?

A. Well, from Bay 9 down through Bay 17.

Q. That did not include Bay 8?

A. No, the limits of the work, if you will notice, is from Bay 9 where the timber crib sits, or did sit, south to Bay 17.

Q. Did they make a subsequent effort to measure the spillway ogee? A. No.

Q. Did Larson Construction Company?

A. No, they did not.

Q. They simply built the crib according to their estimate without a sounding?

A. It was built according to the specifications.

Q. Do you recall the time when they sunk the—towed the crib out and sunk it?

A. Do I recall; no, I wasn't there at the time. I had been transferred from this project to another project when that took place.

Q. Did you have any discussion before your transfer as to the manner in which it would be towed out and sunk? A. No.

Q. Or whether or not when that was done they would close any particular gates? A. No.

Q. Who was in charge at the time it was sunk; do you know? Who was the Project Engineer at the time it was sunk?

(Deposition of Patrick J. Leonti.)

A. That the timber cribbing was removed and disposed of?

Q. No, sunk, first when they put it in.

A. Oh, I would have to back up here a bit. When you say "sunk" you mean set in place to perform the work?

Q. Yes. A. I was there.

Q. You were there? A. Yes, sir.

Q. I am sorry. I perhaps misled you. Do you recall what gates were open when that was done?

A. What gates were open?

Q. Or what gates were closed when that was done? [79]

A. All the gates within the confines of the work area were closed; would have had to be closed. As I say, that was the area in which you were going to perform the work.

Q. Was Gate 8 closed, then?

A. I don't recall.

Q. A couple of times, Mr. Leonti, you referred to the confines of the work area. Do I understand that to mean an area between Bay 9 and the Oregon shore?

A. Well, I am speaking now of the confines of the area in which our repair work was to be done.

Q. When you were using the words "work area" you mean repair work area?

A. Repair, the actual, the ultimate that we were looking for.

Mr. Hazard: Off the record.

(Discussion off the record.)

(Deposition of Patrick J. Leonti.)

Q. (By Mr. Hazard): My associate has a little difficulty because Cell No. 1 was supposed to be set right before Bay 9; is that right?

A. Cell No. 1?

Q. Yes.

A. Let me look at the picture. (Blueprint presented to the witness.)

This is Cell No. 1 (indicating).

Mr. Hazard: Off the record. [80]

(Discussion off the record.)

The Witness: Cell No. 1 is this first cell here immediately downstream of the timber crib.

Q. The timber crib is in Bay 9; is that correct?

A. That is correct.

Q. Well, then, when you speak of———

A. Cell No. 1 is just No. 1 in numerical sequence.

Q. Yes, I understand.

A. In manufacturing sequence, I would say.

Q. What we are trying to do now is to define what you mean by "work area." Do you mean the outside perimeter of the cofferdam to be erected?

A. No, I am referring to which the repair work was to be performed, which is the baffle deck and the baffles within the confines of this cofferdam.

Q. Well, then, it would be the inside perimeter of the cofferdam that we are talking about as the work area?

A. Yes, as the particular work area I am referring to now. Actually, work areas, we have had thousands of others.

(Deposition of Patrick J. Leonti.)

Q. That is what I am talking about.

A. Our ultimate goal was to repair baffles and the baffle deck here in this area (indicating).

Q. I see Cell No. 2 is almost in front of Gate 8; is that correct? It is off-center a little bit?

A. That is right. It is south of the center line of Bay 8. [81]

Q. Do you recall what gates were closed when you put in Cells 1 and 2? A. 1 and 2?

Q. Yes, considering them separately.

A. Well, remembering the sequence of operations, Gates 17 through 9 were closed, had to be closed, and how many other gates were closed I can't recall offhand. 8 would have had to have been closed. That I know. Whether 7, 6 and 5 and so on, I don't recall now just if any of those were closed, but, as I say before, there are records that will indicate the position of the gates at any time.

Mr. Hazard: That is all.

Cross Examination

Q. (By Mr. Mize): Mr. Leonti, are you familiar with, from your engineering experience and education, the turbulence of water and the effect of water falling on water and the distance it might pull in something? Are you familiar with that as an expert?

A. Within limits I am. That is a specialized field.

Q. I understand it is.

(Deposition of Patrick J. Leonti.)

A. That is a hydraulics engineer's problem. I am not a hydraulics engineer.

Q. I was just wondering if you consider yourself a specialist in that field? [82]

A. No, sir.

Q. Or know anything about it? A. No, sir.

Q. So far as the distance and weight of water pulling in an object at a certain distance, you would not be able to give us any expert testimony in that field, would you? A. No, sir.

Mr. Hazard: Would you be able to form any opinion on that?

The Witness: No, sir.

Mr. Mize: That is all.

Mr. Hess: I have no questions.

Cross Examination

Q. (By Mr. Carney): I will ask you, considering your function as Construction Engineer on this project, did you have any control or concern over the means and methods by which the contractors would perform the contract?

Mr. Hazard: I object to that as calling for a conclusion of the witness. He is not competent to answer. The contract speaks for itself as to what his functions and to what his duties were and the extent of control of the United States Government over the contract.

Mr. Carney: He has entered an objection, so you can now [83] answer the question.

The Witness: Well, our assignment, our func-

(Deposition of Patrick J. Leonti.)

tion is to see that whenever a private contractor enters into a contract with the Government that he performs the work and lives up to the specifications and the details of his contract.

Mr. Carney: We have no further questions.

Cross Examination—(Continued)

Q. (By Mr. Mize): One more question here along that line that you have been asking. I take it, Mr. Leonti, that you were kind of a watchdog for the Government on this job; isn't that what it amounts to? A. That is right.

Q. In other words, if there were any complaints from Mr. Larson, any misunderstandings, he would go to you? A. That is correct.

Q. And if the Government had any complaints or wanted to stop the work or continue the work or do anything of that kind, instructions or orders to Mr. Larson would come from you; is that correct? A. That is correct.

Q. Were you concerned at all as a representative of the Government on this job with the conduct of the men, the Larson crew, or how they did their work? [84]

A. You mean all the details as to how they performed their various functions?

Q. Supposing somebody was not doing the job right and you were on the job watching what this man was doing. Would you have any power to request that that man be discharged or be fired by Mr. Larson?

(Deposition of Patrick J. Leonti.)

A. I don't believe that my authority went to that extent.

Q. You don't believe it did. If you saw a man doing something on the job which you felt was not in accordance with the specifications, did you feel that you had authority to tell him to stop that work?

A. If something were being done in direct violation of the specifications, then I would have had the authority to see to it that it was done in the manner that would live up to our specifications.

Q. You do not know what time the barge and the tug took off from wherever it was tied up?

A. No, I do not.

Q. To do this work? A. No, I do not.

Q. Do you have any personal knowledge as to whether or not the Government had any property—— A. Any what?

Q. Any property on this barge or on this tug at the time that they were performing this work?

A. No; no, the Government would not have had any of its own property on either.

Q. Do you know whether it did or didn't?

A. Do I know whether it did or didn't?

Q. Yes, do you personally know whether it did or it did not have any property on it?

A. Well, any Government property that was assigned to the job was also, let us say, assigned to me, and I would have been the one to know whether any Government property had——

Q. Then you would have—any property that

(Deposition of Patrick J. Leonti.)

would have been on the barge, Government property on the barge or on the tug, it would have been there only through your knowledge?

A. That is correct.

Q. Do you know whether or not there were any Government personnel on the barge or on the tug at that time, beforehand before they took off?

A. Before they——

Q. Working around it.

A. No, I would not have known that.

Q. You would not have known that?

A. No.

Mr. Mize: That is all.

Mr. Carney: That is all.

(Deposition Concluded.) [86]

DEPOSITION OF GROVER G. GOEBEL

produced as a witness in behalf of Plaintiffs, having been first duly sworn by the Notary, was examined and testified as follows:

Mr. Carney: I want to advise that we are going to confine this deposition to matters which are material to the issues in the case or which, as the Rules provide, reasonably would refer to testimony of material evidence, to cut down the long exploration that has been going on in the other deposition.

Direct Examination

Q. (By Mr. Hazard): Would you state your name, please. A. Grover G. Goebel.

Q. What is your status, Mr. Goebel?

A. I am foreman of the outside hydraulic operations at Bonneville Dam.

(Deposition of Grover G. Goebel.)

Q. Does that mean you are in charge of the gates? A. That is right.

Q. Do you recall the week of April 16th through 20th which we have been discussing in this deposition? A. I do.

Q. Do you have records which show the positions of the gates during that week?

A. I do. [87]

Mr. Hazard: Off the record.

(Discussion off the record.)

Mr. Hazard: On the record.

Q. Mr. Goebel, I will hand you a document, really two documents clipped together, called Plaintiffs' Deposition Exhibit No. 3 for Identification, which appears to be a photostatic copy of the gate log record, and we wish you would describe it.

A. Yes, this is a gate log record from the control room. These records here are my records from the main dam.

Q. Are the control records made up from your records?

A. They are made up by phone call immediately after the operation is completed. They give us the time.

Q. I see; so that you perform the operation of moving a particular gate? A. That is right.

Q. You call up the control room and tell them that you have done that? A. That is right.

Q. And you tell them how many dogs?

A. That is right.

Q. They tell you what time?

(Deposition of Grover G. Goebel.)

A. That is right.

Q. And you enter the time in your——

A. We log it; yes, sir.

Q. So that they should correspond in each instance? [88] A. They should, yes.

Q. On the log in Line 3 it is indicated that at 11:45 A.M. Gate 10 was closed from one dog to two dogs. That is, does that mean that it was closed shut? A. That is right.

Q. How wide is a dog?

A. That is a 50-foot gate, and that is open nine inches.

Q. Assume they are gates less than 50 feet..

A. That 60-foot gate was 18 inches on the first dog. We are talking about one dog now.

Q. How wide is Gate 9?

A. Gate 9 is open, well, roughly speaking, four foot eight inches, roughly speaking.

Q. What does that one dog on Gate 9——

A. Gate 9, the first dog would be 9 inches. The second dog would be plus 24 inches, roughly speaking, within a fraction of an inch.

Q. On Gate 10 the first dog is nine inches?

A. That is right.

Q. What is the second dog?

A. The second dog would be plus 24 inches, and thereafter every dog is 24 inches after the first dog.

Q. On all gates? A. On all gates.

Q. What is the first dog on Gate 8? [89]

A. The first dog on Gate 8 would be 9 inches.

Q. And thereafter 24? A. Thereafter 24.

(Deposition of Grover G. Goebel.)

Q. The inches you are referring to is the amount of opening between the bottom of the gate——

A. And the seal of the gate, yes; the bottom of the gate and the——

Q. The seal?

A. Top of the ogee seal; that is right.

Q. The record indicates 11:45 on Friday, August 20th, Gate 9 was closed from two dogs—no dogs—I am sorry; strike that. At 11:45 a.m. Gate 10 was closed from one dog to no dogs? A. Right.

Q. Do you recall the circumstances of that closure? A. Yes, sir.

Q. Will you tell us about that?

A. About 10:00 o'clock in the morning Mr. Holzgang, Chief of Powerhouse Operations, called me up and stated by 12:30 they wanted 9 and 10 on seal, and we complied with that order, and at 12:30, as the log shows, twelve was on seal. I went out myself and operated during the noon hour.

Q. I see that under this chart under Gate 8 Gate 8 was closed from two dogs to no dogs at 12:30. Do you recall why that was done, the circumstances under which that was [90] done?

A. Yes, sir; when I discovered at 2:00 o'clock after I heard a distress whistle and I came back from the dock one of my men called me out to Gantry 6, and I knew there was trouble because I heard the distress whistle blowing from the contractor's derrick and barge at Bay 17, so we ran out to see what it was. As soon as I saw what happened, why, I ordered my operator to go up in the

(Deposition of Grover G. Goebel.)

cab and start closing 8 and all gates as fast as he could and to notify Mr. Capps immediately, and we went right to work.

Q. So that it is your recollection that the closing of Gate 8 to no dogs was after the accident?

A. Yes, sir.

Q. Mr. Goebel, tell us the width of Bay 10?

A. About 50 feet, approximately.

Q. And 9?

A. 50 feet; they are all standard.

Q. And 8? A. All standard?

Q. All? A. Any gate will fit any slot.

Q. They are all approximately 50?

A. Approximately 50 feet; maybe 52.

Q. Is the hole that that gate closes the same width in every case? [91] A. Yes.

Q. And that hole is approximately 50 feet wide?

A. That is right.

Q. So that when a gate is open one dog there will be a slot of water coming out 50 feet wide and however many inches the first dog of that particular gate is raised? A. That is right.

Q. How do you determine the number of dogs—I see over on the right-hand column "Total Dogs." Is that——

A. That indicates the total number of dogs open at the time, regardless of what gate. If you total the dogs throughout the openings, they should total the number in the right-hand column, total dogs.

Q. Is that number kept for the purpose of keep-

(Deposition of Grover G. Goebel.)

ing track of how much water you are letting through?

A. The control room handles that end of it. They know how many dogs and they determine how much water is being passed, how much they have to pass according to the load on the powerhouse, and we just keep the number of dogs so as we can keep a check with the control room.

Q. They tell you how many dogs to keep open; is that correct? A. Yes, sir.

Q. Do they tell you which gates to keep open?

A. Yes, sir. [92]

Q. So that every change in gates you make is pursuant to an order from the control room?

A. Yes, sir.

Q. Do you participate in the determination of which gate you will keep open in any particular instance?

A. Under normal operations, on account of the fish run, then we do work the gates so there is no operation down below, systematically try to keep them level below so there is no eddies—if that will answer your question.

Q. You have a pattern of gate-opening?

A. To a certain extent, yes, so that we try to keep eddies out of the tailrace so that the fish have a nice lead-in into the fish run.

Q. You so regulate the gates that are down so that you do not have a turbulence right under the fishways that would disturb the fish; is that it?

A. That is the object of it, yes. You see, if you

(Deposition of Grover G. Goebel.)

open up the wrong gates, why, you create eddies and stuff, so we try to keep it as level as possible.

Q. For that purpose you have a system of gates?

A. That is right.

Q. Were you following that system on August 20th?

A. August 20th; no, I couldn't follow that system because half of the dam was closed, approximately half.

Q. Do your records show at what time 11 through 17 were [93] closed?

A. Yes, sir.

Q. Prior to the 20th?

A. Yes, sir; all gates were on seal at 8:00 a.m. on August 13th. All gates were on seal from 11 to 17.

Q. Was there any change from that between the 13th—is that the date you gave me, sir?

A. Not on those gates; no, sir.

Q. Then 11 through 17 the gates then from 8:00 a.m. of the 13th through to the date of the accident? A. Yes, sir.

Q. Can you give us the total dogs that were open at 12:01 a.m. on the 19th?

Mr. Carney: Just a minute.

Mr. Hazard: Off the record.

(Discussion off the record.)

Q. (By Mr. Hazard): Do you recall, Mr. Goebel, during this week whether the water level behind the dam was such that when you opened the dog of a particular gate that the dog would be utilized to

(Deposition of Grover G. Goebel.)

the full extent? Do you follow me—that you would not have any air space between the bottom of the gate when you opened it, the dog, and between the bottom of the gate and the water? That is, when you opened the gate you were getting the full use of the opening dog; is that correct?

A. Yes, that will hold true regardless of the elevation [94] of the lake, regardless of what the elevation of the lake is. The only thing, the pressure is a little higher on a higher lake, but about that time we were holding about 73.5, I presume.

Q. That refers to height of water behind the——

A. Behind the gate; yes, sir.

Q. Is 73.5 the water level well above the bottom of the gates; is that correct?

A. Yes, the elevation of the ogee, I believe, approximately plus 24, and the elevation of the lake is 73.58, along in there.

Q. Was that the approximate level during this week? A. Yes, sir.

Q. I believe you stated that after the gates were closed, you closed them during the lunch hour. I am talking now of Gates 9 and 10.

A. That is right.

Q. Then you went to lunch?

A. Yes, sir; I ate a little bit before, a little bit after. Then that was it.

Q. Were you at the dam when the disaster took place? A No, sir.

Q. Did you see the tug and barge at any time before you left? A. No, sir.

(Deposition of Grover G. Goebel.)

Q. Did you see them in the lower area? [95]

A. No, sir.

Q. Before they took out?

A. No, sir; I paid no attention to it.

Q. You saw them at no time during the morning of the 20th?

A. No, sir. They had the derrick barge there and what other equipment I had no idea. I paid no attention to it.

Q. You say "derrick barge." Is that another barge, then?

A. Yes, that is a derrick barge. He brought that in on the 17th, tied it up to Pier 17.

Q. That is a separate barge than the one they brought out here?

A. That is a different barge, yes, than the one that sunk.

Q. Do you know whether any of your men observed the barge coming out?

A. Not to my knowledge.

Q. Do you know what man was on the gates after you left?

A. Well, Jack Rohrer was on the watch with me.

Q. He is one of your subordinates?

A. That is right.

Q. Where was he stationed, do you know?

A. All morning long — we jammed a gate that morning. Then we were greasing Gate, Bay 15. We jammed the gate in the upstream slot so we were busy and did not see below. The gates close up up-

(Deposition of Grover G. Goebel.)

stream. We put the gate in Bay 15, then lowered the gate in Bay 15 to start greasing it. [96]

Q. Did Mr. Rohrer tell you whether or not he had observed the barge coming out?

A. No, sir; he didn't.

Q. Were there any other men on the dam in your crew or otherwise, to your knowledge, at the time the barge came up?

A. Well, I had two men working with me. I was shorthanded that day, and I had Mr. Miller and Mr.——

Mr. Carney: Maybe I can give his name. His first name is spelled A-r-i-k, and his last name is G-o-l-a-s-h-e-f-f, and Elmer W. Miller was the second one.

Q. (By Mr. Hazard): Mr. Miller and Mr. Golasheff, are they members of your crew?

A. No, I borrowed them from another crew to help me groove the gate.

Q. Do you know whether they were up there after you left for the lunch hour at 12:30 or not?

A. No, they were greasing the wheels at the gate.

Q. At the time? A. At the time; yes.

Q. You don't know whether Mr. Rohrer was up there at the time or not? You think he was?

A. No, I presume he was up there, of course, with those men.

Q. They were working on Gate 15?

A. Bay 15.

Q. Bay 15? [97] A. That is right.

(Deposition of Grover G. Goebel.)

Q. Did either Golasheff or Miller tell you whether or not they observed the tug or barge coming up approaching the dam?

A. They never told me nothing, but it was from my observation they didn't know a thing about it until I called them off the job to come with me after I heard the distress whistle, so evidently they didn't know.

Q. From the position where they were working you couldn't see down below?

A. No, sir; not down below. There is a parapet wall.

Q. There is a parapet there? A. Yes.

Q. Did you have any instructions prior to the morning of the 20th with respect to closing any of the gates except Gates 11 through 17 for — that arose out of the operation of Larson's Construction Company? A. Except in 11 to 17, you say?

Q. Yes.

A. No, that is all the instructions I had was just 9 and 10 bays by 12:30.

Q. In addition to the instruction that you had already carried out about 11 through 17?

A. Those orders were given to me by Mr. Capps on the 13th. They were not to be opened any more. They were out of service. In other words, we were then jamming the gates in the upstream [98] slot after that for the contractor's purpose.

Q. How long have you worked on the dam, Mr. Goebel? A. 1934, February 8th.

Q. From the very beginning?

(Deposition of Grover G. Goebel.)

A. Yes. I beg your pardon; for the Government, 1938. I was working for the contractor in 1934.

Q. Since 1938 have you been in charge of the gates there? A. No, sir.

Q. How long have you been in charge of the gates? A. About the last ten years.

Q. Based on your experience, in your opinion would there have been any reason why you could not have closed Gate 8 as a practical matter in the operation of the dam?

A. I have no idea. We get that information from the control room. They know the flow of the water. I have no idea.

Q. You make no judgment as to whether or not a gate could or should be open?

A. No, that is up to them. They know what the load is, what the river flow is. We have no way of recording that, only once every eight hours we read the staff gauge.

Q. Which is the height of the water?

A. That is in the forebay.

Q. Forebay means behind the dam, upstream side? A. That is right, upstream.

Q. In your experience have you had a situation where the [99] staff gauge is approximately in the height where you have had more than eight gates closed? A. Beg your pardon?

Q. Have you ever had eight or more gates closed?

A. Oh, yes; we read the staff gauge even when we are on seal.

(Deposition of Grover G. Goebel.)

Q. Total seal?

A. Total seal, yes, the staff gauge, whatever the water is, the staff gauge.

Mr. Carney: I think he misunderstood your question. I would appreciate it if you would state the question. He may not have interpreted it right.

Mr. Hazard: All right.

Q. In your experience, in a situation when the staff gauge was in the vicinity of 73 have you ever known of a situation where you had more than eight gates closed?

A. I still don't get that question.

Mr. Carney: Perhaps the question is whether it would be possible to close the main seven or eight gates when you had an elevation of 73-some feet behind the dam. What would you do with the water?

The Witness: No, we can't, or it would flow over the top of the gates then. It all depends on how much power we are consuming, what the river flow is. That governs the situation. [100]

Q. (By Mr. Hazard): Is it your testimony that you could not close more than eight gates with the water at 73?

A. Could not close more than eight gates with the water at 73.

Q. You couldn't do it. You say you would have an overflow, then?

A. She overflows at 73. She slops over at 73.6.

Q. If you had that 73.6, in order to lower that

(Deposition of Grover G. Goebel.)

level, that would be determined by the number of dogs you would open up; is that correct?

A. If the water was 73.6 what?

Q. And you wanted to lower the water level, would you go about lowering it by determining the number of dogs?

A. That is right; if you lower the lake, you would have to pull dogs.

Q. Could you lower a given number of dogs for simply two gates and leave the other sixteen closed? Say you had to get twelve dogs open. Could you open twelve dogs on two gates and leave all of the other gates closed?

A. Yes, it could be done, but it isn't too successful because we get a terrible turbulence in the tailrace because you have got to have the gates as near level as you can to get away from turbulence.

Q. What is the problem created by this turbulence that you are talking about? [101]

A. If you open the gates, as you say, six dogs or twelve dogs on one end of the dam, why, you then would not be able to stand at the tailrace. It would just swing you around there and throw you out.

Q. How about if you had to use six gates?

A. That levels off better. That is why you notice we try to keep the gates level as we can.

Q. If you had to distribute—could you feasibly distribute 25 dogs among six gates if they were all at one end?

A. I wouldn't say possibly that you could be-

(Deposition of Grover G. Goebel.)

cause there would be too many dogs there. 25 dogs at six gates, that would be—say 30 dogs at six gates, that would be five dogs apiece. That would be too much water for that end. We would start washing out our bank. We have got to watch that.

Q. The downstream bank?

A. The downstream bank; yes, sir.

Q. How about 20 dogs, let us 18 dogs.

A. Same thing. It all depends. You have got to watch where you open, how you open. We try not to open up the end gates any more than during high-water periods even then because that would be maybe two, three, seven, sixteen—on account of the bank washing, and we just let enough water go through there to keep that, to keep the water from washing the bank out.

Q. Did the staff gauge indicate this was in high-water [102] period?

A. The upstream staff gauge is in operation the year around.

Q. I mean at this particular time was this a high-water period?

A. Yes; yes, we were spilling, but we had not shut down from the spring freshet yet.

Q. Mr. Goebel, can you form any opinion as to how fast the water would go through Bay 8 at two dogs at a staff gauge of approximately 73?

Mr. Carney: I will interpose an objection. He is not qualified as an expert to answer that question.

Q. (By Mr. Hazard): All right: I will ask you, then, have you made any observation of water,

(Deposition of Grover G. Goebel.)

of the velocity of water going through the gates?

A. I beg your pardon? I didn't hear with all the noise outside.

Q. Have you made any observation of the velocity of water going through the gates?

A. Naturally.

Q. You have done that over the course of the years of your experience there? A. Yes, sir.

Q. Can you form any opinion as to the velocity of the water going through Gate 8 at two dogs?

A. The velocity of water going through Bay 8 at two dogs is plenty heavy.

Q. Could you express that in feet per second or miles per hour?

A. I can't. I have a chart at home which I don't have to refer to myself. The control room has that, and I also have a chart at my desk which gives me that amount going under that gate, but I don't have that knowledge in my brain.

Q. You work from a chart which sets that forth? A. Yes, sir.

Q. Those figures have been worked out; is that correct? A. That is right.

Q. Do you have any—does that chart refer to the volume of water?

A. That is what the chart is for, how much water we are passing under any gate at any given point at any certain gate elevation.

Q. Would that indicate both velocity and volume? A. Not velocity; volume, I believe.

Q. Do you have any idea based on your observation about the velocity alone?

(Deposition of Grover G. Goebel.)

A. No, I have no idea what your velocity would be. It was never measured, to my knowledge. I never measured it.

Q. About how far downstream with the gate open, with two dogs open, is the turbulence such that you can see bubbling [104] white water? Can you form any estimate as to the distance downstream?

A. Downstream from the open gate your water comes through, hits your baffles, builds up into that swirl, you know. We all know that. Then you see white water down below. What you call white water would be caused from the rush of the water, oh, a couple hundred of feet.

Q. Is there an initial turnaround; then there is white water a couple hundred feet; is that correct?

A. Yes, sir.

Q. In that initial turnaround about how far does that extend out from the dam?

A. Oh, roughly estimated, about between 40 and 50 feet from the pier noses. That is an estimate.

Q. About how far from the seal—is that the correct designation—the bottom of the gate?

A. That is right.

Q. From the seal to the water level below the dam, how far is that distance?

A. Well, that is determined by the elevation of the tailrace. The seal is at plus 24. I believe I am right on that now. That is the seal of the crest of the ogee. Then, of course, the water, whatever water elevation you had.

(Deposition of Grover G. Goebel.)

Q. Does your record show what the elevation of the tailrace was on this—— [105]

A. My records don't show that; no, sir.

Q. The powerhouse has that?

A. The powerhouse has that.

Mr. Carney: There are records on that.

Q. (By Mr. Hazard): With respect to this spillway dam?

The Witness: Yes, sir.

Q. If you had a gate open—if Gate 8 were open two dogs and you had an order to close it, how long would it take you to execute that order?

A. All depends where the lift boom of the crane is.

Q. That moves up and down across the face of the dam?

A. Up and down on the dock, and the lift boom moves a foot per minute.

Q. How long is the distance from the end of the Gate 2 to the end of Gate 17, the breadth of the track on which the crane moves?

A. How much distance from Bay 2 to 17?

Q. How long is the track on which that crane moves?

A. Oh, we just have to multiply that. I don't know offhand. That would be about 54 feet to the bay, I think, center to center, roughly speaking, times that many bay from Bay 2 to 17.

Q. Once you get the crane into place, how long would it take you to move a gate down two dogs?

(Deposition of Grover G. Goebel.)

A. Approximately 30 minutes, roughly speaking. [106]

Q. Would that be true of all the gates?

A. All but the 60's. They are 10 feet high. That would cut off about ten minutes off the operation.

Q. Which are the 60's?

A. I beg your pardon?

Q. Which are the 60's?

A. The 60's are, as a rule, in Bay 2, 3, 16, 17, plus 18. Of course, we are not counting 1 and 18. They are dead.

Q. They are on the ends?

A. They are on the ends.

Mr. Hazard: That is all.

Mr. Carney: No further questions.

(Discussion off the record.)

Mr. Hazard: Mr. Goebel, you have a right under the Federal Rules of Civil Procedure to read your deposition and to sign it; that is, at the time that the Reporter writes it out on the typewriter. You can read it over and then sign it, or you can waive your right and simply rely on the fact that he is taking your testimony down correctly. You *might to* consult with Mr. Carney.

The Witness: I waive.

(Deposition concluded.)

(Reading and signature waived.) [107]

[Endorsed]: No. 15685. United States Court of Appeals for the Ninth Circuit. Henry L. Hess, Jr., Administrator of the Estate of George William Graham, deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 241]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
May 16, 1958
(omitted in printing)

[fol. 242]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Healy, Pope and Hamley, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—August 20, 1958

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 243]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,685—Aug. 20, 1958

HENRY L. HESS, JR., Administrator of the Estate of George William Graham, Deceased, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the District of Oregon

Before: Healy, Pope, and Hamley, Circuit Judges.

OPINION—August 20, 1958

Hamley, Circuit Judge:

The sinking of a tug and barge being utilized in repairing the spillway deck of Bonneville Dam gave rise to this action. Five of the six men on board the tug and barge lost their lives. The administrator of the estate of one of these men brought this action against the United States, to recover damages for wrongful death. Jurisdiction was asserted under the Tort Claims Act, 28 U.S.C.A., §§ 1346(b), 2674.[1]

[fol. 244] The case was tried without a jury. Plaintiff asked the court to render judgment in his favor under the provisions of the Employers' Liability Law of Oregon

---

[1] 28 U.S.C.A., § 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C.A., § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

(Liability Law).[2] In the alternative, he sought recovery under the Oregon Wrongful Death Act.[3] The Government's position was that, since the accident occurred on navigable waters within the territorial limits of Oregon, only the [fol. 245] Wrongful Death Act could be applied, and that the United States was not liable thereunder.

The trial court held that the Liability Law did not apply, and that the plaintiff failed to prove a breach of duty which would make the United States liable under the Wrongful Death Act. Judgment was therefore entered for defendant. Plaintiff appeals, challenging the determinations made by the trial court with regard to each of these statutes.

The facts necessary to be considered on this appeal, as set out below, are drawn from undisputed findings of fact entered by the trial court.

Bonneville Dam, owned and operated by the United States, is located on the Columbia River, between the states

---

[2] ORS 654.305:

"Generally, all owners, contractors, or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

[3] ORS 30.020:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $20,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased."

of Oregon and Washington. The Columbia River constitutes navigable waters of the United States, and the point where the accident occurred, as set out below, lies within the jurisdiction of the state of Oregon.

Bonneville Dam consists of several facilities, including a powerhouse which lies between the Oregon shore and Bradford Island, and a spillway dam which lies between the island and the Washington shore. The spillway dam contains eighteen bays, which, for convenience herein, are numbered 1 through 18, starting with the fishway bay on the Washington shore as bay 1.

In each bay, there is a movable gate fifty feet wide and fifty feet high. These gates are opened and closed by being lifted or lowered in a vertical direction. When shut, they rest on the top of the "ogee" section, which is the upper line of the submerged stationary portion of the dam. On the bed of the river, extending downstream across the width of the dam, is a concrete structure called the baffle deck. This deck is dotted with concrete blocks called "baffles," which are built into the deck. Their function is to dissipate the energy of the water discharged through the dam, and to reduce its downstream velocity.

In the interval between the completion of the dam in 1938 and the summer of 1954, the baffles had become eroded by the flow of water. Desiring to restore them to their original condition, the United States entered into a contract with Larson Construction Company (Larson), an independent contractor. The contract contemplated the [fol. 246] construction of a cofferdam closing off the south half of the spillway baffle deck. It was understood that construction of this cofferdam would be commenced while water was being discharged through the spillway dam.

By the terms of the contract, Larson was obliged to inform the United States of all steps proposed to be taken which would affect the operation of the dam. The contractor was to supply all equipment, including the tug and barge involved in this action, and all labor used in the performance of the contract. The United States had no control over the manner or method by which the work under the contract was to be accomplished. It was interested only

in the general result in conformity with the contract specifications. The United States, however, retained a right to inspect the work of the contractor. The contract further contemplated that the operation of the dam, including the spillway dam gates, would be conducted by personnel of the United States.

On August 13, 1954, the United States notified Larson that the water level of the river was such that work under the contract should commence no later than August 23, 1954. On the same day (Aug. 13, 1954), following a conference between personnel of the United States and the contractor, it was found possible to close gates 11 through 17. This included all of the gates on the south half of the spillway dam from gate 11 southward toward Bradford Island, except for the fishway gate. These gates were closed on that date, and remained closed during all times material to this suit.

The Government inspector in connection with this work was Patrick S. Leonti. In addition to his inspection duties, Leonti was to act as liaison between the contractor and Government employees concerned with the operation of the dam. Leonti informed Larson that any requests for closing the gates in the spillway dam should be made through him.

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib. This crib was to rest in bay 9, starting at the top of the ogee curve and running at right angles to the face of the dam. Larson concluded that the curved slope, as originally constructed, may have become eroded to some degree. He therefore determined that it was necessary to take sound-[fol. 247] ings in bay 9, for the purpose of establishing the true cross section of the ogee at that time.

On August 18, 1954, the contractor's representative informed Leonti that the contractor proposed to take soundings in bay 9 on August 20, 1954. This would be done, Leonti was informed, by taking a tug and barge into bay 9, and taking soundings off the side of the barge. Leonti was requested to have the gates in bays 9 and 10 closed by 12:30 p.m. on August 20, to facilitate the planned operations.

Leonti forwarded this request to the operations division of the dam, and, at the designated time, gates 9 and 10 were closed. Gates 11 through 17 had already been closed, as previously indicated. Larson sought no advice from the Government personnel at the dam, and the latter gave Larson no advice as to the hazards of the proposed sounding operation.

The day before this operation was to take place, the contractor's superintendent performed a reconnaissance run in another tugboat in the same area. His purpose was to determine whether it would be a safe operation. Based on this reconnaissance run and on personal observation, Larson determined that the operation could be safely performed.

Shortly before 2:00 p. m., on August 20, 1954, Larson's tug "Muleduzer," pushing his barge, set out from Bradford Island. The barge was made fast to the tug by four steel lines, and the two craft were, in effect, a unit. The equipment and personnel to be utilized in the operation were selected solely by Larson.

No employee of the United States participated in this operation, or gave the contractor or any of his employees any directions or orders with respect to it. Nor was there any intermingling of employees of the United States with those of the contractor in connection with the work being performed at the time of the accident. Appellant's decedent was a member of the sounding party aboard the tug. He occupied a nonsupervisory capacity, and had no control with respect to the manner in which the sounding operation was to be conducted.

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and headed [fol. 248] upstream for bay 9. At this time, the flow of the Columbia River was 191,100 cubic feet per second. Of this flow, 52,300 cubic feet per second was being discharged through the spillway dam. Gate 8 was then open thirty-two inches, and 5,700 cubic feet of water per second was flowing through it. Gate 6 was open to the same extent, and accommodated the same flow of water. Gate 7 was open fifty-five inches, and 9,100 cubic feet of water was flowing through it.

As the tug and barge approached bay 9, the turbulent condition of the water in the spillway basin was open, apparent, and obvious to all, including the contractor, the operator of the tugboat, and the other employees of the contractor. The difference in elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates, was also visible and obvious.

When the barge reached bay 9, it veered north. The port bow of the barge struck the pier between bays 9 and 8, stoving a hole in the bow of the barge. As water came through the hole, the barge moved over in front of bay 8 and the other open bays north of bay 8. The barge and tug were swamped and sunk, with the barge being broken to pieces. The men aboard the tug and barge were thrown into the water, and all were drowned except one deckhand.

The immediate cause of the accident and the deaths of the men was the turbulent condition of the water. This condition made it impossible to control the movements of the tug and barge, and caused the barge to strike the pier.

On these facts, the trial court held, as previously noted, that the Liability Law was not applicable. The court did so for two separate and distinct reasons: (1) the Liability Law could not be constitutionally applied in this case, and (2) if it could be applied, the United States was not liable thereunder because it was not responsible for the work being performed by the decedent.

With regard to the first of these reasons, the trial court was invoking the principle that precludes the application of state statutes which "work material prejudice to the characteristic features of the general maritime law. . . ." Southern Pacific Co. v. Jensen, 244 U. S. 205, 216.

[fol. 249] In order for this principle to control this case, the trial court must have made two determinations: First, it must have held that the circumstances of the case called for application of the general maritime law, with modification or supplementation by Oregon statutes which would not work material prejudice to the characteristic features of the general maritime law. Second, it must have held that the Liability Law did not constitute constitutionally permissible supplementation of the general maritime law.

Appellant argues that the trial court erred with regard to each of these determinations.

Had this been a suit between private persons to recover damages for personal injuries rather than wrongful death, the general maritime law would unquestionably apply. This is true because admiralty jurisdiction depends upon whether the injury was inflicted upon navigable water, irrespective of where the wrongful acts or omissions occurred. The Plymouth, 70 U. S. 20, 36.[4] Here it is established that the accident occurred on navigable water.

But, since the workman in this accident was killed, it would have been constitutionally permissible, in a suit between private persons, to apply the Oregon Wrongful Death Act, instead of the general maritime law, which provides no remedy for wrongful death. In Western Fuel Co. v. Garcia, 257 U. S. 233, 242, it was held that application of a state wrongful death act, under such circumstances, will not work material prejudice to the characteristic features of the general maritime law. See, also, Thompson v. Union Fisherman's Co-op Packing Co., 128 Ore. 172, 273 Pac. 953.

Since the Oregon Wrongful Death Act would thus have been applied in a suit between private persons, this would [fol. 250] seem to require a like holding in this suit, in which the United States is the defendant.[5]

Appellant, however, points to the closing words of 28 U.S.C.A., § 1346(b) a provision of the Tort Claims Act, as calling for a different result. The statutory language relied

---

[4] An exception is made where the subject-matter of the litigation is a matter of mere local concern. Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, 477. See, also, Hahn v. Ross Island Sand & Gravel Co., ... Ore. ....., 320 P.2d 668. But here it cannot be doubted that the activities in which decedent was engaged had a direct relation to navigation and commerce. Bonneville Dam has been recognized by the supreme court of Oregon as an aid to navigation. Atkinson v. State Tax Commission, 156 Ore. 461, 62 P.2d 13, 67 P.2d 161, affirmed, 303 U. S. 20. See, also, section 1 of the act authorizing the Bonneville Project, approved August 20, 1937 (16 U.S.C.A., § 832), which begins: "For the purpose of improving navigation on the Columbia River and for other purposes incidental thereto. . . ."

[5] See the "if a private person" and "as a private individual under like circumstances" clauses of the Tort Claims Act, footnote 1.

upon reads: ". . . Where the United States, if a private person, would be liable to the claimant in accordance with the law of the place *where the act or omission occurred.*" (Emphasis supplied.)

Appellant argues that the quoted language operates to change the general conflicts rule which would apply the law of the place where the accident occurred, and requires application of the law where the wrongful acts or omissions occurred. Since the asserted negligent acts or omissions of the United States took place on the spillway section of Bonneville Dam, which, he asserts, is an extension of Oregon land, it is contended that the general maritime law has no application. Therefore, the proper law to be applied, appellant urges, is the Liability Law, as that is the law which would be applied between private persons in an action based on negligence occurring on land in that state. Under this theory, the question of whether the Liability Law would work material prejudice to the characteristic features of the general maritime law would be immaterial.

Inherent in appellant's analysis, summarized above is the proposition that the statutory words, "place where the act or omission occurred," mean the place where the act or omission first manifested itself. Support for this proposition is to be found in the majority opinion in Eastern Air Lines v. Union Trust Company, D.C.Cir., 221 F.2d 62, 80.

This court, however, has given these statutory words a different construction. In United States v. Marshall, 9 Cir., 230 F.2d 183, 187, it was held that these words mean the place where the negligence, either of act or omission, "became operative, directly causing the injury and not places where the negligence existed but was then inoperative."

[fol. 251] Applying this rule here, it follows that any act or omission of Government personnel on Bonneville Dam became operative, directly causing injury, on the navigable waters of the Columbia River. It was there that the tug and barge went out of control and were swamped and sunk by reason of the force, turbulence, and volume of water coming through the spillway gates. Hence the tort law to be applied is that which Oregon would apply with regard to a tort committed on its navigable waters.

But, even if it were to be assumed that the law which controls is that of the place where the act or omission first manifested itself, there are other considerations which call for rejection of appellant's ultimate conclusion.

The "place" referred to in the statute means the state in which the act or omission occurred, not a particular locality or kind of terrain within the state (such as Bonneville Dam), as appellant assumes. In our view, the context, and particularly the immediately preceding statutory words, "the law of the," require this conclusion.

Moreover, the "law" of the state to be applied is not limited to the law having direct reference to tort liability. It includes, also, the law of the state concerning conflict of laws (as in diversity cases) and the law to be applied in determining whether an admiralty or nonadmiralty case is presented. This conclusion is required because the statutory words, "law of the place," are broad enough to include the areas last mentioned, and those areas are not excepted in the statute.

This conclusion is also required because the more limited construction which appellant would place on this language runs counter to other provisions of the Tort Claims Act. The accident here in question actually occurred on navigable water. In a suit between private persons, Oregon would have applied the general maritime law as supplemented by state statutes which will not work material prejudice to the characteristic features of the general maritime law.

The United States is entitled to similar treatment, else it would not be liable "in the same manner and to the same extent as a private individual under like circumstances," as [fol. 252] required by the Tort Claims Act. 28 U.S.C.A., §§ 1346(b), 2674. In order for the government to receive this similar treatment, it must be held that the Oregon law to be applied includes the law of conflicts and the law to be applied in determining whether this is an admiralty or non-admiralty case.

The view just expressed is not in harmony with the result reached in Eastern Air Lines v. Union Trust Company, supra. The reason the majority in that case restricted "the law of the place" to be applied to tort liability law,

and excluded these other areas of substantive law, is not indicated in the opinion. The precise question of whether admiralty or nonadmiralty law should be applied was not presented in the Eastern Air Lines case.

For the reason indicated, we are of the opinion that the Liability Law may not be applied in this case, unless it is a constitutionally permissible supplementation of the general maritime law. We now consider whether it is.

A provision of the Liability Law requires all owners, contractors, subcontractors, or other persons having charge of, or being responsible for, any work involving a risk or danger to the employees or the public to "use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." ORS 654.305.

Under this statute, the circumstances under which one person may have some duty of care with regard to another person are enlarged over those prevailing under the general maritime law. More important, the standard of care which must be met in fulfilling such duty is greatly increased over what it would be under general maritime law.

Appellant has acknowledged that the standard of care required under the Liability Law is higher than under the general maritime law, where, as here, the doctrine of unseaworthiness has no application. The supreme court of [fol. 253] Oregon has also so held.[6] That court has also expressly held that, where the rights of the parties are to be determined by the maritime law, the provisions of the Liability Law are not applicable. Hawkins v. Anderson & Crowe, 84 Ore. 94, 164 Pac. 556, 558.[7]

Appellant points out that, with respect to defenses, the Liability Law is closer to the general maritime law than is

---

[6] Hoffman v. Broadway Hazelwood, 139 Ore. 519, 10 P.2d 349, 11 P.2d 814; Fromme v. Lang & Co., 131 Ore. 501, 281 Pac. 120.

[7] See, also, Sanderson v. Sause Bros. Ocean Towing Co., 114 F.Supp. 849. Contra, Keithley v. North Pacific SS Co. (D. Ct.) 232 Fed. 255.

the common law, which would be applied under the Oregon Wrongful Death Act.[8] What is lost sight of, however, is that, under the general maritime law, appellant could not even get into court, because an action for wrongful death will not lie.

The courts have come to the aid of the plaintiff in this circumstance to the extent of making available a state wrongful death statute. Under that statute, however, a defendant is chargeable with no greater standard of care than would be the case under the maritime law, and he gains the benefit of the more effective defenses of the common law. See 1 Benedict on Admiralty, 6th ed., 392, § 148. On balance, this is held to produce a result which does not work material perjudice (sic) to the characteristic features of the general maritime law.

What appellant is asking for, however, would upset this balance in two particulars. While gaining, as in the case of the Wrongful Death Act, an avenue of relief not available in admiralty, he would also (1) benefit from an increase in the standard of care which the Liability Law would place upon appellee, and (2) escape the more effective defenses [fol. 254] which he would have to meet were the Wrongful Death Act being applied. In our view, the result would be an unconstitutional displacement of the essential features of general maritime law.

We therefore conclude that the trial court did not err in holding that the Liability Law could not be constitutionally applied in this case.[9]

---

[8] Appellant draws this comparison between the defenses which are available:

Incident	*Common Law*	*Maritime Law*	*Employers' Liability Law*
Contributory negligence	Complete Defense	Mitigation of damages	Mitigation of damages
Assumption of risk	Complete Defense	Mitigation of damages	No defense
Negligence of fellow servant	Complete Defense	No defense	No defense

[9] It is unnecessary for us to consider whether the trial court was also correct in ruling that, if that act were applied, the United States would not be liable thereunder because it was not responsible for the work being performed by the decedent.

The final question presented is whether the trial court erred in determining that appellant was not entitled to recover under the Oregon Wrongful Death Act because negligence had not been proved.

In questioning this determination, appellant does not attempt to charge the United States with negligence, if any, of the independent contractor. It argues, however, that the United States is here in the same position that an owner of premises would be with respect to employees of an independent contractor engaged in work on the premises. Contending that Government personnel must have been aware of the hazards of navigating the tug and barge in bay 9, under the conditions then existing, appellant asserts, in effect, that they should have decreased the hazard (presumably by closing additional gates in the area), or should have warned the contractor of the extreme danger.

We assume, for present purposes, that the United States owed a duty to decedent equivalent to that owed by an owner of premises to the employee of an independent contractor working on the premises. We also agree with appellant that, under the evidence, Government personnel charged with operating the dam were aware of the amount and velocity of water which was going through the spillway gates at the time of the accident. A finding of fact, if the trial court had made it, that Government personnel must have realized that the proposed sounding operation involved a certain amount of danger, would also be supportable.

But we find no basis in the record for the inference appellant wants us to make, that Government personnel "were [fol. 255] aware of the limited power of the tug Muleduzer, and its inability to cope with the turbulent water in the spillway basin. . . . ". Nor does the evidence warrant a finding appellant would have us make, that Government personnel knew, or should have known, that the contractor and his employees "did not fully appreciate the great danger created by the spillway gates immediately adjacent to bay 9 being permitted to remain open."

The record indicates that the contractor had more information concerning the hazards to be met than did Government personnel. The amount and velocity of the flow

through the spillway gates were known to him. The turbulence it created was open and apparent. In addition, the contractor knew the capabilities of his tug, and was familiar with the way it and the barge could be operated. He had also made a personal reconnaissance of the area on the previous day. With all of this information, he yet misjudged the danger. Government personnel, with less information, could not be expected to have a better appreciation of the danger.[10]

Dye v. United States, 6 Cir., 210 F.2d 123, cited by appellant, is inapposite. There, actions were brought to recover for the wrongful death of several persons who were drowned when their small boats were sucked by a strong current through an open wicket of a dam on the Ohio River. It was held that the United States was negligent in its failure to use protective measures for the benefit of navigators, and to give adequate warning of the dangerous condition at the dam to small boats navigating near it.

In the Dye case, the open wickets on the dam amounted to a latent hazard, not perceivable by members of the public boating upstream. In our case, however, the turbulent condition of the water was observable, and observed, by all. Here, in addition, the contractor had made an independent study of the hazards involved, and had satisfied himself that the work could be safely accomplished.

[fol. 256] If it be assumed, however, that the negligence of Government personnel could be inferred from the evidence, it was not a necessary inference, and the trial court was not required to make it. As stated in United States v. Marshall, 9 Cir., 230 F.2d 183, 187, "negligence is ordinarily a question of fact to be resolved by the trier of fact. [Citing cases.] It is only where the facts are undisputed *and* where but one reasonable conclusion can be drawn therefrom the negligence becomes a question of law."

Whether the determination of the trial court that there was no breach of common-law duty owing to decedent is

---

[10] Had the contractor asked for the closure of more gates, this would presumably have been done. Had it not been done, the contractor could have declined to proceed. The sounding operation was not specifically required by the contract.

viewed as a finding of fact or a conclusion of law, we hold that, in making that determination, the trial court did not err.

AFFIRMED.

[fol. 257]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,685

HENRY L. HESS, JR., Administrator of the Estate of George William Graham, deceased, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—Filed August 20, 1958

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and order of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted]

[fol. 258] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 259]

SUPREME COURT OF THE UNITED STATES

No. 438, October Term, 1958

HENRY L. HESS, JR., Administrator of the Estate of George William Graham, Deceased, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—March 2, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

the statute refers to the law of the place where the negligence became operative, directly causing injury, thus calling for the application of general maritime law. (cf. *Jordan v. States Marine Corporation*, 257 F.(2d) 232 [C.A. 9].)

The appellate court further held that the word "place" referred to in the statute means the state in which the act or omission occurred, not a particular locality or kind of terrain. Therefore, in applying the law of a particular state, the court should include the state's conflicts of law rules and the state law to be applied in determining whether an admiralty or non-admiralty case is presented.

Apart from this interpretation of the federal statute, the Court of Appeals also held that because of the higher than common law standard of care prescribed by the Oregon Employers' Liability Act, its application to this case would result in an "unconstitutional displacement of the essential features of general martime law."